SUPREME COURT, U. S.

OCT. 2 1967

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No. 64

In the

# Supreme Court of the United States

OCTOBER TERM, 1967

UNITED ARTISTS CORPORATION,

*Appellant,*

*v.*

CITY OF DALLAS,

*Appellee.*

*On Appeal From the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas*

## BRIEF FOR THE APPELLANT

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## BRIEF FOR THE APPELLANT

## OPINIONS BELOW

The oral opinion of the trial court (R. 116-117) is not officially reported, nor are the two concurring opinions of the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas. (R. 161-177) The appellate opinions are reported unofficially at 402 S.W. 2d 770 (Tex. Civ. App. 1966). In denying the Application for Writ of Error, no

reversible error (R. 182), the Supreme Court of Texas announced no opinion.

## JURISDICTION

Following the entry of judgment in the Court of Civil Appeals on April 5, 1966 (R. 178), Appellant United Artists Corporation (hereinafter referred to as "United Artists") filed a Motion for Rehearing, which was denied on April 25, 1966. (R. 179-180) United Artists' Application for Writ of Error to the Supreme Court of Texas was filed on May 19, 1966, and denied on July 27, 1966. (R. 182) United Artists next filed a Motion for Rehearing and then a Supplemental Motion for Rehearing, both of which were denied by the Supreme Court of Texas on October 19, 1966. (R. 188) From such denial, no further review was available to United Artists in the state courts of Texas and, accordingly, its Notice of Appeal to this Court was filed in the Court of Civil Appeals on January 16, 1967. (R. 192-194) United Artists filed its Jurisdictional Statement herein on March 16, 1967, and probable jurisdiction was noted on May 15, 1967. (387 U.S. 903)

Jurisdiction of this Court is founded on 28 U.S.C. 1257(2).

## LEGISLATION AND CONSTITUTIONAL PROVISIONS INVOLVED

Ordinance No. 11284, enacted by the City Council of the City of Dallas on November 22, 1965, is challenged herein on its face and as applied to restrain exhibition of the motion picture "VIVA MARIA" on the grounds that both the ordinance and its application in this case are repugnant

to the First Amendment to the United States Constitution and to Section 1 of the Fourteenth Amendment thereto. The text of the ordinance is set forth in full in an Appendix hereto (App. A, *infra.*). Pursuant to Ordinance No. 11284, Appellee City of Dallas created a Motion Picture Classification Board which classifies all motion pictures before their exhibition as either "suitable for young persons" or "not suitable for young persons."[1]

## RELEVANT PROVISIONS

Section 46A-1. *Definition of Terms:*

* * *

(d) 'Young person' means any person who has not attained his sixteenth birthday.

* * *

(f) 'Not suitable for young persons' means:

(1) Describing or portraying brutality, criminal violence or depravity in such a manner as to be, in

---

1. An earlier Dallas classification ordinance, No. 10963, was held unconstitutional by the United States District Court for the Northern District of Texas. *Interstate Circuit, Inc. v. City of Dallas,* 247 F. Supp. 906 (November 9, 1965). The present ordinance, No. 11284, was passed immediately thereafter.

In addition to this appeal and No. 56 on the Court's current docket, in which Interstate Circuit, Inc. is appellant, both involving application of Ordinance No. 11284 to the motion picture "VIVA MARIA" by state courts, the ordinance has also been attacked in a Federal suit seeking declaratory and injunctive relief. The United States District Court for the Northern District of Texas and the Court of Appeals for the Fifth Circuit both held that the ordinance was invalid in part and valid in part. *Interstate Circuit, Inc. v. City of Dallas,* 249 F. Supp. 19 (December 23, 1965); aff'd, 366 F. 2d 590 (August 30, 1966). However, no injunction issued to prohibit the City from enforcing those portions of the ordinance which were held invalid. The Federal suit is the subject of two petitions for certiorari pending before this Court. *Interstate Circuit, Inc. v. City of Dallas* (No. 42); *City of Dallas v. Interstate Circuit, Inc.* (No. 44).

the judgment of the Board, likely to incite or encourage crime or delinquency on the part of young persons or

(2) Describing or portraying nudity beyond the customary limits of candor in the community, or sexual promiscuity[2] or extra-marital or abnormal sexual relations in such a manner as to be, in the judgment of the Board, likely to incite or encourage delinquency or sexual promiscuity on the part of young persons or to appeal to their prurient interest.

A film shall be considered 'likely to incite or encourage' crime delinquency or sexual promiscuity on the part of young persons, if, in the judgment of the Board, there is substantial probability that it will create the impression on young persons that such conduct is profitable, desirable, acceptable, respectable, praiseworthy or commonly accepted. A film shall be considered as appealing to 'prurient interest' of young persons, if in the judgment of the Board, its calculated or dominant effect on young persons is substantially to arouse sexual desire. In determining whether a film is 'not suitable for young persons', the Board shall consider the film as a whole, rather than isolated portions, and shall determine whether its harmful effects outweigh artistic or educational values such film may have for young persons.

* * * * *

Section 46A-3. Classification Procedure:

(a) Before any initial exhibition, the exhibitor shall file a proposed classification of the film to be exhibited,

2. Ordinance No. 11401, enacted by the City Council of the City of Dallas on March 21, 1966, added to Section 46A-1 the following provision, which is not involved in the instant appeal:

"(n) The term 'sexual promiscuity' as used in this Chapter shall mean indiscriminate sexual intimacies beyond the customary limits of candor in the community, and said term as defined herein shall include, but not be limited to sexual intercourse as that term is defined."

stating the title of the film and the name of the producer, and giving a summary of the plot and such other information as the Board may by rule require, together with the classification proposed by the exhibitor. The Board shall examine such proposed classification, and if it approves same, shall mark it 'approved' and file it as its own classification order. If the Board fails to act, that is, either file a classification order or hold a hearing within five (5) days after such proposed classification is filed, the proposed classification shall be considered approved.

(b) If upon examination of the proposed classification a majority of the Board is not satisfied that it is proper, the Chairman shall direct the exhibitor to project the film before any five (5) or more members of the Board, at a suitably equipped place and at a specified time, which shall be the earliest time practicable with due regard to the availability of the film. The exhibitor, or his designated representative, may at such time make such statement to the Board in support of his proposed classification and present such testimony as he may desire. Within two (2) days, the Board shall make and file its classification of the film in question.

(c) Any initial or subsequent exhibitor may file an application for a change in the classification of any film previously classified. No exhibitor shall be allowed to file more than one (1) application for change of classification of the same film. Such application shall contain a sworn statement of the grounds upon which the application is based. Upon filing of such application, the City Secretary shall bring it immediately to the attention of the Chairman of the Board, who upon application by the exhibitor shall set a time and place for a hearing and shall notify the applicants and all interested parties, including all exhibitors who may be exhibiting or preparing to exhibit the film. The Board shall view the film and at such hearing, hear the statements of all interested parties, and any proper testimony that may be offered,

and shall within two (2) days thereafter make and file its order approving or changing such classification. If the classification of a film is changed as a result of such hearing to the classification 'not suitable for young persons', the exhibitors showing the film shall have seven (7) days in which to alter their advertising and audience policy to comply with such classification.

(d) Upon filing by the Board of any classification order, the City Secretary shall immediately issue and mail a notice of classification to the exhibitor involved and to any other exhibitor who shall request such notice.

(e) A classification shall be binding on any subsequent exhibitor unless and until he obtains a change of classification in the manner above provided.

Section 46A-4, *Offenses:*

(a) It shall be unlawful for any exhibitor or his employee:

(1) To exhibit any film which has not been classified as provided in this ordinance.

(2) To exhibit any film classified 'not suitable for young persons' if any current advertisement of such film by such exhibitor fails to state clearly the classification of such film.

(3) To exhibit any film classified 'not suitable for young persons' without keeping such classification posted prominently in front of the theatre in which such film is being exhibited.

(4) Knowingly to sell or give to any young person a ticket to any film classified 'not suitable for young persons'.

(5) Knowingly to permit any young person to view the exhibition of any film classified 'not suitable for young persons'.

* * *

(c) It shall be unlawful for any person:

(1) To sell or give to any young person a ticket to an exhibition of a film classified 'not suitable for young persons'.

(2) To make any false or willfully misleading statement in an application for change of classification or in any proceeding before the Board.

(3) To make any false statements for the purpose of enabling any young person to gain admittance to the exhibition of a film classified 'not suitable for young persons'.

(d) To the extent that any prosecution or other proceeding under this ordinance, involves the entering, purchasing of a ticket, or viewing by a young person of a film classified 'not suitable for young persons', it shall be a valid defense that such young person was accompanied by his parent or legally appointed guardian, husband or wife, throughout the viewing of such film.

* * *

Section 46A-7. *Judicial Review:*

(a) Within two (2) days after the filing of any classification by the Board, other than an order approving the classification proposed by an exhibitor, any exhibitor may file a notice of non-acceptance of the Board's classification, stating his intention to exhibit the film in question under a different classification. Thereupon it shall be the duty of the Board to do the following:

(1) Within three (3) days thereafter to make application to a District Court of Dallas County, Texas, for a temporary and a permanent injunction to enjoin such defendant-exhibitor, being the exhibitor who contests the classification, from exhib-

iting the film in question contrary to the provisions of this ordinance.

* * *

(b) The filing of such notice of non-acceptance shall not suspend or set aside the Board's order, but such order shall be suspended at the end of ten (10) days after the filing of such notice unless an injunction is issued within such period.

(c) Failure of any exhibitor to file the notice of non-acceptance within two (2) days as required in Subdivision (1) [sic] of this Section 46A-7, shall constitute acceptance of such classification order and such exhibitor shall be bound by such order in all subsequent proceedings except such proceedings as may be had in connection with any application for change of classification under Subdivision (c) of Section 46A-3 above.

## QUESTIONS PRESENTED

### I.

**Whether the Dallas Classification Ordinance is void on its face because it authorizes the restraint of motion pictures on constitutionally impermissible grounds.**

### II.

**Whether the Dallas Classification Ordinance as applied imposed an unconstitutional restraint on exhibition of the motion picture "Viva Maria."**

### III.

**Whether the Dallas Classification Ordinance is void on its face for failure to provide the procedural safeguards required by the First and Fourteenth Amendments to the United States Constitution and by prior decisions of this Court.**

## STATEMENT

United Artists, a national distributor of motion pictures, owns the exclusive domestic distribution rights to the feature motion picture "VIVA MARIA," a large-budgeted, French-language, comedy-adventure film with English subtitles.[3] The film stars Brigitte Bardot, Jeanne Moreau and George Hamilton, was directed by Louis Malle, and has a music score by the internationally renowned composer Georges Delerue.

"VIVA MARIA" had its American premiere in New York City on December 18, 1963. Bosley Crowther, film critic for *The New York Times*, described the movie as "light-hearted fun" and likened the "wild adventures" of its two heroines to those of Bob Hope and Bing Crosby in their numerous "Road to . . ." films. (R. 151) Wanda Hale of *The New York Daily News* gave the film her newspaper's highest rating, and described it in the following manner:

> "With Gallic humor and Hollywood know-how, obtained from keen observation, Louis Malle has made le western fou—meaning a mad, zany, crazy western. Viva Maria is its name, co-starring Brigitte Bardot and Jean [sic] Moreau as a song and dance team with a travelling circus who become leaders in a Central-American revolution.
>
> "Leave your incredulity at home before going to either the Astor or the Plaza Theatre to see this outrageously funny spoof on our outdoor action films. English titles are helpful if you don't understand the

3. The film also was distributed in various parts of the United States in a visually identical version but with dubbed-in English dialogue. The dubbed version was never exhibited within the City of Dallas.

French language but the action speaks for itself, eloquently. As the French love our westerns, M. Malle will most likely win the legion d'honneur for outdoing Hollywood at its own game.

"Malle photographed his petticoat western in Mexico, Panavision, Eastmancolor, a first for a French director. Stunning scenic backgrounds may get the cameraman a French prize. In the vast undertaking, Malle keeps the story by Jean-Claude Carriere and himself well under control. Every sequence reflects a lively, vivid imagination in this, his first attempt to make a comedy of epic proportions.

"As for the stars, Bardot the sex kitten, and Moreau, fine dramatic actress, are both delightful in comedy roles. Moreau is more sedate in her performance but neither overdoes it. Brigitte proves that she is an accomplished comedienne with clothes on. Except for their strip-tease act together, both are fully clothed in dresses of the period, early 20th Century. Both girls are named Maria, which adds to the confusion of most characters and the merriment of the film.

"Maria I (Moreau) and Maria II (Bardot) are forced into the shootingest revolution in film history by one Flores, played by George Hamilton, who's a failure as an insurrectionist.

"On his deathbed, Flores makes a request, pleading with the woman he loves, Maria I, to carry on the fight against the rich, brutal despots of San Miguel. Giving her promise, Maria I rallies the lethargic peons into a wildly enthusiastic fighting force.

"Teaching peasants the art of guerilla warfare is Maria II, who has learned revolutionary tactics from her Irish father, an anarchist who was chased out of both Ireland and England and who was killed in Central America.

"An expert with dynamite, guns and small cannon, she leads the rebels in actual warfare. No wonder that the tyrants are wiped out to the last man!

"The stars, George Hamilton, and a few French players are assisted by Mexican actors of note and thousands, it seems, of extras. Malle has directed his actors and action with tongue in cheek, a genius for comic invention, an exaggeration of what he has seen in American westerns and a little bit of Ian Fleming thrown in.

"Where does he go from here? Not, I hope, to conceal his marvelous sense of humor in those way-out dramas of sordid life. Even if he hasn't directed a masterpiece, Louis Malle has made a fun picture that anybody with a broad sense of humor can enjoy to the fullest." (R. 152)

**The Classification Board**

Although Ordinance No. 11284 was enacted by the City Council of the City of Dallas on November 22, 1965, the City did not immediately begin to enforce it because of a suit in the United States for the Northern District of Texas attacking its constitutionality. On December 20, 1965, that Court issued a judgment in which the ordinance was held valid in part and invalid in part.[4] The District Court also stayed enforcement of the ordinance for 30 days from the date of its judgment, but did not issue an injunction prohibiting the City from thereafter enforcing those provisions of the ordinance found to be invalid. Upon expiration of the order staying enforcement of the ordinance, the Motion

4. The District Court's Findings of Fact and Conclusions of Law were not issued until December 23, 1965. 249 F. Supp. 19; aff'd, 366 F. 2d 590 (5th Cir. 1966). The Federal suit is the subject of two petitions for certiorari pending in this Court. See n. 1, *supra*.

Picture Classification Board created pursuant thereto commenced operating.

On January 17, 1966, United Artists licensed "VIVA MARIA" to Interstate Circuit, Inc. (hereinafter referred to as "Interstate") for a run of four to six weeks at the Esquire Theatre, a commercial motion picture theatre within the city limits of the City of Dallas. The license agreement provided that United Artists would receive 25% to 60% of the receipts derived from exhibition of the film, depending on its box-office gross. (I. Ex. 1; R. 101, 146-147)

As required by the ordinance, Interstate on January 24, 1966, filed its proposed classification (P. Ex. 3; R. 38, 135-136)—"suitable for young persons"—and at the same time furnished the Motion Picture Classification Board with a *Motion Picture Herald* review in which "VIVA MARIA" was described as "one of the funniest and most imaginative motion pictures to appear on the screen in a very long time." (P. Ex. 8; R. 38, 136)

At the Board's request, a print of the film was made available for screening. On February 9, 1966, the Board classified "VIVA MARIA" as "unsuitable [sic] for young persons" (R. 138), even though only five of the eight Board members who voted in favor of the classification had actually seen the film. (R. 60, 70) Neither the minutes of the Board (P. Ex. 4; R. 38, 137-139) nor the notice of classification to Interstate (P. Ex. 5; R. 39, 140-141) specified or gave any indication of the ground or grounds upon which the Board

had classified the motion picture, although there are 46 separate and distinct grounds in the ordinance upon which the Board may base a "not suitable" classification. (App. B, *infra.*)[5]

The effect of the "not suitable" classification was to exclude persons under the age of 16 years from viewing "VIVA MARIA" and to require that all advertisements for the film carry the legend "not suitable for young persons." (Section 46A-4(a) (2, 4, 5); R. 125-126)[6]

On February 11, 1966, Interstate filed a "notice of non-acceptance" of the Board's classification (P. Ex. 6; R. 40, 142), stating its intention to exhibit "VIVA MARIA" as "suitable for young persons." If Interstate had not filed such notice within two days of the entry of the Board's classification order, that order would have become final without any judicial determination that exhibition of "VIVA MARIA" could properly be restrained as "not suitable for young persons." (Section 46A-7(c); R. 131)

5. In the Federal suit previously referred to, both the District Court and the Court of Appeals for the Fifth Circuit held that the ordinance would be valid only insofar as applied to classify motion pictures which would be "obscene when viewed by an audience of young persons." 249 F. Supp. at 24; 366 F. 2d at 598-599. However, neither of those courts issued an injunction prohibiting the Board from applying the standards of the ordinance as written.

6. However, if a person under the age of 16 years were to be prosecuted for *entering, purchasing* a ticket to or *viewing* a motion picture classified as "not suitable for young persons," a valid defense would be established if it were shown that such "young person" "was accompanied by his parent or legally appointed guardian, husband or wife, throughout the viewing of such film." (Section 46A-4(d); R. 127)

It is unclear from the terms of the ordinance whether such a defense would be available to an exhibitor who is prosecuted for *selling* or *giving* to a "young person" a ticket to any film classified as "not suitable for young persons." (See Section 46A-4(a)(4); R. 126)

## The Trial Court

On February 14, 1966, three days before the film was scheduled to have its initial exhibition within the City of Dallas, the City filed in the District Court of Dallas County a petition for a temporary and permanent injunction against Interstate, as sole defendant, to require Interstate to exclude persons under the age of 16 years from viewing "VIVA MARIA" and to advertise the motion picture as "not suitable for young persons." (P. Orig. Pet., Para. VI; R. 4.) In its petition, the City alleged that "VIVA MARIA" was a film:

> ". . . portraying sexual promiscuity in such manner as to be in the judgment of the Board likely to incite or encourage juvenile delinquency or sexual promiscuity on the part of young persons or to appeal to their prurient interests." (R. 3)[7]

The proposed classification was filed, the screening was requested and held, the classification order was entered and filed, the notice of non-acceptance was filed, and suit was commenced without any notice to United Artists or an opportunity for United Artists to be heard, despite its obvious constitutional interest in the unfettered exhibition of "VIVA MARIA."

United Artists appeared in the injunction proceeding by filing its Answer in Intervention (R. 6-15), and on February 16, 1966, was permitted to intervene over the City's objection that the trial court had no jurisdiction to determine the constitutional issues raised by United Artists. (R. 31-33)

7. The Motion Picture Classification Board itself specified no reason for its classification of "VIVA MARIA." These allegations first appeared in the petition, which was verified by a City attorney who was not a member of the Board. An objection was duly made on this ground. (R. 18)

Since the case was tried on City's prayer for a temporary injunction, under Texas procedure a jury was not available and the case was heard by a single judge. City offered testimony of three witnesses in support of the classification: John Gilliland, an attorney and vice chairman of the Board; Reverend James Robert Maceo, a member of the Board; and Frank Martin, captain in charge of the Dallas Police Department's juvenile bureau.

Mr. Gilliland admitted that the Board had made no specific finding as to why "VIVA MARIA" should be classified as "not suitable for young persons" (R. 63). In his opinion, the film fell afoul of those provisions in the ordinance which deal with portrayals of violence (R. 64, 67, 73-74) and sexual promiscuity (R. 67, 71-72). However, he was "sure" that alleged "sacrilege" had entered into the Board's determination (R. 64), and conceded that the film did not actually portray sexual promiscuity but at most merely implied it (R. 66, 68). In addition, he testified that the film did have some artistic value. (R. 67)

Reverend Maceo testified that in his opinion "VIVA MARIA" would tend to create the impression that sexual promiscuity was commonly accepted. (R. 81-82, 92) However, he likewise admitted that sexual promiscuity was never shown in the film (R. 81); that the question of "sacrilege" had been raised during the Board's deliberations (R. 94); and that the film did have artistic value. (R. 96) He also testified that the Board had based its decision solely on standards then prevailing in the local Dallas community. (R. 93-94)

Captain Martin testified merely that there were juvenile morals problems in the City of Dallas, but that he had no idea or opinion as to what caused such problems. (R. 98)

The City of Dallas offered no convincing evidence in support of its allegations that the film (1) "portray[ed]" sexual promiscuity, *or* that (2) it was likely to incite or encourage (a) juvenile delinquency *or* (b) sexual promiscuity on the part of young persons, *or* (3) that it would appeal to the prurient interests of young persons.[8]

Nevertheless, after hearing the testimony summarized above and viewing the film, the trial judge, called in from Waxahachie, Texas to hear the case, Honorable A. R. Stout, rendered the following oral opinion:

> "The Court: Oh, I realize you gentlemen might be right. There are two or three features in this picture that look to me would be unsuitable to young people. Actually, they have tried to track that Friedman [sic] case, looks like, in this ordinance, and if any ordinance can be passed, why, it looks like they have taken every ground to pass one, if one can be valid, that is, valid. So I enjoin the exhibitor, its agents, servants, attorneys and employees from exhibiting it. I guess it is like a book by Mark Twain where he had a vaudeville show and was making no money, the owners of it. Then he had a man to get nude and painted him in striped paint, charged a dollar, which was unheard of in those days, limited it to men only and said, 'If this doesn't get the money, I don't know Arkansas,' and they did quite well. I sustain the City's position, find it okay, and enjoin them." (R. 116-117)

8. United Artists introduced as evidence on behalf of the film the affidavit of its Dallas branch manager and several reviews of "VIVA MARIA." (I. Ex. 2; R. 115, 148-154)

On February 18, 1966, the second day of the film's initial Dallas engagement, the trial court enjoined defendant Interstate and intervenor United Artists from exhibiting or advertising "VIVA MARIA" except as "not suitable for young persons." (R. 155-156)

### The Court of Civil Appeals

United Artists appealed to the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas. (R. 156) Two justices of that court, acting in the absence of the third, viewed "VIVA MARIA" and on April 5, 1966 affirmed the trial court's judgment. (R. 178) Chief Justice Dixon, in whose opinion Associate Justice Bateman concurred, held, in the alternative, that "VIVA MARIA" was (1) "not suitable for young persons" under the ordinance standards; (2) obscene under the constitutional tests enunciated by this Court, and (3) obscene if such tests were modified so that the film would be "judged by the average young person." (R. 170) Whether the film had any social value was apparently immaterial: "We hold that 'VIVA MARIA' has only a minimum of social value, if any at all, as to children under the age of sixteen years." (R. 171) Justice Bateman, in whose opinion the Chief Justice concurred, held that the ordinance was not directed at motion pictures which were obscene and that "VIVA MARIA" could properly be classified as "not suitable for young persons" under the standards of the ordinance as written. (R. 174-175)

United Artists' Motion for Rehearing in the Court of Civil Appeals was denied on April 25, 1966. (R. 179-180)

### The Supreme Court of Texas

On May 23, 1966, United Artists filed an Application for Writ of Error in the Supreme Court of Texas. The Application was refused on July 27, 1966, with the court indicating that it found "no error requiring reversal of the judgment of the Court of Civil Appeals." (R. 182) The Supreme Court of Texas so acted without even viewing "VIVA MARIA." United Artists next filed a Motion for Rehearing and then a Supplemental Motion for Rehearing, both of which were overruled by the Supreme Court of Texas on October 19, 1966. (R. 188)

This Court noted probable jurisdiction on May 15, 1967. (387 U.S. 903)

## SUMMARY OF ARGUMENT

### I.

(A) Motion pictures are a medium of expression protected by the First and Fourteenth Amendments. *Burstyn v. Wilson*, 343 U.S. 495, 502 (1952). The exhibition of motion pictures cannot be restrained on grounds other than obscenity. *Jacobellis v. Ohio*, 378 U.S. 184 (1964); *Redrup v. New York*, 386 U.S. 767 (1967); *Memoirs v. Massachusetts*, 383 U.S. 413 (1966). The Dallas classification ordinance, as written, as applied by the City of Dallas, and as construed by the Texas courts, restrains expression not on the basis of obscenity but on grounds "short of obscenity." (Respondent's Brief in Reply to United Artists

Corporation's Application for Writ of Error in the Supreme Court of Texas, pages 14, 15, 17); *Interstate Circuit, Inc. v. City of Dallas*, 402 S.W. 2d 770, 778 (Tex. Civ. App. 1966) (R. 174-175). Whether obscenity may be determined on the basis of definitions drawn expressly with minors in mind is therefore not an issue presented in this appeal. Although the Court of Appeals for the Fifth Circuit attempted to sustain the constitutionality of the ordinance by limiting its application to motion pictures which would be "obscene when viewed by an audience of young persons," *Interstate Circuit, Inc. v. City of Dallas*, 366 F. 2d 590, 599 (5th Cir. 1966), the constitutional validity of the ordinance must be adjudged by this Court on the basis of the ordinance as written and as construed by the Texas courts in this litigation. *Kingsley Pictures Corp. v. Regents*, 360 U.S. 684, 688 (1959).

This Court has held that, short of actual incitement to conduct which the state may prohibit, it is constitutionally impermissible to restrain the nonobscene expression of ideas. *Kingsley Pictures Corp. v. Regents, supra; Terminiello v. Chicago*, 337 U.S. 1 (1949). The constitutional right of free speech protects expression to minors as well as to adults. *Police Commissioner of Baltimore v. Siegel Enterprises*, 233 Md. 110, 162 A. 2d 727 (1960), *cert. den.*, 364 U.S. 909 (1960); *Katzev v. County of Los Angeles*, 52 Cal. 2d 360, 341 P. 2d 310 (1959); *William Goldman Theatres, Inc. v.*

*Dana*, 405 Pa. 83, 173 A. 2d 59, *cert. den.* 368 U.S. 897 (1961); *Paramount Film Distributing Corp. v. City of Chicago*, 172 F. Supp. 69 (N. D. Ill. 1959); *Commonwealth v. Corey*, .... Mass. ...., 221 N.E. 2d 222 (1966). See also: Comment, "Exclusion of Children from Violent Movies," 67 *Colum. L. Rev.* 1149, 1158 (1967).

The Dallas classification ordinance is therefore void on its face.

(B) The standards contained in the Dallas ordinance are vague, indefinite and overbroad, and cannot constitutionally serve as a basis for restraining expression. The safeguards of the Constitution are applicable to minors as well as to adults. *In re Gault*, 387 U.S. 1 (1967); *People v. Kahan*, 15 N.Y. 2d 311, 206 N.E. 2d 333, 258 N.Y.S. 2d 391 (1965); *William Goldman Theatres, Inc. v. Dana, supra.* The precision required in standards relating to the dissemination of speech has never been held to be diminished because the standards governed expression to minors rather than to adults. *People v. Kahan, supra; William Goldman Theatres, Inc. v. Dana, supra.* See also: Comment, "Exclusion of Children from Violent Movies," *supra*, at 1166.

The standards contained in the Dallas ordinance for determining whether exhibition of a motion picture may be restrained as "not suitable for young persons" are unconstitutionally vague. See *Winters v. New York*, 333 U.S. 507, 515 (1948); *Commercial Pictures v. Regents*, 346 U.S. 587

(1954); *People v. Bookcase, Inc.*, 14 N.Y. 2d 409, 201 N.E. 2d 14, 252 N.Y.S. 2d 433 (1964). Conditioning the restraint on the likelihood of "incitement" or "encouragement" does not cure the vagueness of the standards. See *Winters v. New York, supra; Police Commissioner of Baltimore v. Siegel Enterprises, supra; People v. Bookcase, Inc., supra; Katzev v. County of Los Angeles, supra; Adams v. Hinkle*, 51 Wash. 2d 763, 322 P. 2d 844 (1958). That portion of the ordinance which defines "incitement" by whether a motion picture would probably create an impression on young persons that certain conduct is "profitable, desirable, acceptable, respectable, praiseworthy, or commonly accepted" only serves to compound the vagueness. *Kingsley Pictures Corp. v. Regents, supra*, at 701 (Clark, J., concurring).

The vagueness of the individual standards is aggravated by the numerous grounds upon which a motion picture may be restrained under the ordinance. Forty-six separate and distinct grounds for classification are provided therein, thereby creating an overbreadth which impairs freedom of expression. See *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965); *Keyishian v. Board of Regents*, 385 U.S. 589, 609 (1967); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960).

## II.

Appellant United Artists has never been informed of the basis on which "VIVA MARIA" was classified "not suitable for young persons." The record in this case indicates that

"VIVA MARIA" might have been (but not that it was) so classified (1) on the basis of any one of the 46 separate and distinct grounds contained in the ordinance, or (2) on the basis of some imprecise and faintly articulated variation of standards enunciated by some members of this Court. It also indicates that (3) some members of the Dallas Motion Picture Classification Board may even have reached beyond the terms of the ordinance itself to employ a constitutionally impermissible standard ("sacrilege") in finding the film "not suitable for young persons." The fact that it cannot be said with certainty that the classification was not based on such an invalid ground is by itself sufficient to require reversal of the judgment below. *Terminiello v. Chicago*, 337 U.S. 1, 5-6 (1949); *Stromberg v. California*, 283 U.S. 359, 368 (1931).

In addition, if the standards of the classification ordinance are to be ignored and one or more of the various approaches to obscenity heretofore taken by the members of this Court are to be substituted in judging "VIVA MARIA," it is clear that it could not possibly be found obscene in the constitutional sense. See *Redrup v. New York*, 386 U.S. 767, 770-771 (1967). Moreover, neither the film itself nor the record in this case supports a finding that "VIVA MARIA" would be obscene when viewed by persons under the age of 16 years. It was not shown (1) that the film was primarily directed to such persons, *or* (2) that it did in fact appeal to the prurient interests of such persons, *or* (3) that it was patently offensive as to such persons, *or*

(4) that it was utterly without redeeming social value as to such persons. See *Mishkin v. New York*, 383 U.S. 502, 508-510 (1966); *Memoirs v. Massachusetts*, 383 U.S. 413, 418 (1966); *Manuel Enterprises, Inc. v. Day*, 370 U.S. 478, 486 (1962). Finally, the record is bereft of evidence showing that "VIVA MARIA" falls within the express terms of the ordinance's classification standards, either as written or as construed in this litigation. See *Thompson v. Louisville*, 362 U.S. 199 (1960).

Classification of "VIVA MARIA" as "not suitable for young persons" was therefore a clearly unconstitutional application of the ordinance.

## III.

(A) "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). An administrative procedure for prior review of films is valid only if there is a guarantee of judicial participation before exhibition of a film is restrained on the basis of its content. *Freedman v. Maryland*, 380 U.S. 51, 55, 58-59 (1965). The Dallas ordinance does not guarantee a judicial determination that a motion picture is "not suitable for young persons" before its exhibition may be restricted in accordance with such a classification. The ordinance conditions judicial participation upon the filing of

a "notice of non-acceptance," thereby imposing a condition precedent to the exercise of a First Amendment right. An analogous condition precedent was held invalid by this Court in *Lamont v. Postmaster General*, 381 U.S. 301 (1965). The provision in the Dallas ordinance which conditions the institution of judicial proceedings upon the filing of a notice of non-acceptance is therefore violative of this Court's decisions in *Freedman v. Maryland, supra*, and *Lamont v. Postmaster General, supra.*

(B) The First Amendment guarantee of free expression encompasses distributors as well as exhibitors of motion pictures. *Lovell v. Griffin*, 303 U.S. 444, 452 (1938); *Bantam Books, Inc. v. Sullivan, supra, at* 64n.6. The Dallas ordinance does not accord any rights thereunder to the distributor of a film reviewed by the Motion Picture Classification Board, even though this Court has held repeatedly that persons whose legal rights are to be determined by administrative or judicial proceedings are constitutionally entitled to notice thereof and an opportunity to be heard. *Armstrong v. Manzo*, 380 U.S. 545, 550 (1965); *Schroeder v. City of New York*, 371 U.S. 208, 211-214 (1962); *Mullane v. Central Hanover Bank*, 339 U.S. 306, 314-315 (1950). See also: *Bantam Books, Inc. v. Sullivan, supra*, at 71. The fact that a distributor may sometimes receive some kind of informal notice of classification proceedings is no substitute for the due process requirement that the distributor of a motion picture be given direct, formal and specific notice of the date and nature of any proceeding vitally affecting its constitutional rights. *In re Gault*, 387 U.S. 1, 31-34 (1967);

*City of New York v. New York, New Haven & Hartford Railroad Co.*, 344 U.S. 293, 297 (1953). Unless the distributor is accorded the right under the ordinance to notice and an opportunity to defend his motion picture, infringements of his First Amendment rights may too often go unremedied. *Bantam Books, Inc. v. Sullivan, supra,* at 64n.6.

As written, the Dallas ordinance is void on its face for failure to accord due process to the distributor of a motion picture reviewed by the Board.

## ARGUMENT

### I.

### THE DALLAS CLASSIFICATION ORDINANCE IS VOID ON ITS FACE BECAUSE IT AUTHORIZES THE RESTRAINT OF MOTION PICTURES ON CONSTITUTIONALLY IMPERMISSIBLE GROUNDS.

#### A. The exhibition of motion pictures is restrained on grounds other than obscenity.

This Court may in some other case be faced with deciding the constitutionality of laws which restrict the sale or exhibition of obscene materials to minors on the basis of definitions of obscenity drawn expressly with minors in mind.[9] This is not such a case. The Dallas Classification Ordinance does not on its face purport to restrict, nor has it been applied by City or interpreted by the Texas courts

[9] Compare *Ginsberg v. New York* (No. 47, October Term, 1967), which has been set down for argument with this case.

as restricting, the exhibition of motion pictures which are obscene when viewed by persons under the age of 16 years.

The standards for classification contained in §46A-1(f)[10] of the Dallas ordinance are not, and are not intended to be, standards of what is deemed to be obscene to persons under 16 or any other age group. The City has sought to protect young persons from certain ideas and portrayals, all short of any concept of obscenity. The City has consistently so recognized and indeed has so contended throughout this and related litigation:

> "We disagree with that portion of Petitioner's [United Artists'] Brief, which states that the only unprotected area of expression at which the Dallas Ordinance could be said to be directed, is that of obscenity because if the motion pictures are actually obscene, then they are not entitled to the privileges and the immunities granted under the First Amendment of the Constitution of the United States anyway. *It is something short of obscenity that is being classified in this Ordinance.*[11]
>
> * * *
>
> "* * * If the movies are required to be obscene insofar as young persons are concerned, then no ordinance would be required to suppress them because they would not have any standing under the United States Constitution."[12]

[10] Supra pgs. 3, 4.

[11] Pages 14-15, Respondent's Brief in Reply to the Petitioner United Artists Corporation's Application for Writ of Error, filed in the Supreme Court of Texas, a part of the Record herein though not printed. (Emphasis added)

[12] *Id.* page 17. This identical position is asserted by City on Page 8 of its pending Petition for a Writ of Certiorari in No. 44, October Term 1967, *City of Dallas v. Interstate Circuit, et al:*

"The one thing that the Circuit Court failed to recognize is that if the standard ["obscene when viewed by an audience of young persons"] is applied as suggested by that Court and the movie is obscene insofar as young persons is concerned, then its presentation to young persons may be totally prohibited because it is not protected under the First Amendment to the Constitution. It need not be classified; it can be denied."

The Court of Civil Appeals for the Fifth Supreme Judicial District of Texas in this case, in applying the ordinance, similarly did not restrict it, or interpret it as being restricted, to motion pictures which are obscene when viewed by an audience of young persons. In his concurring opinion below (R. 174-175), Justice Bateman, with whom Chief Justice Dixon concurred, wrote:

> "It is my firm opinion that the constitutional guarantees of free speech may not properly be invoked to defeat the worthy purposes of the ordinance in question. The classification of a motion picture as 'not suitable for young persons' is not by the terms of the ordinance made to depend on whether the motion picture is obscene, and I do not believe the United States Supreme Court intended, in Near v. Minnesota, 283 U.S. 697, 716, 75 L. Ed. 1357, 1367, or in any other case, to make such a stringent limitation on the powers of a state or city in this field.
>
> "The ordinance under examination, in defining the phrase 'not suitable for young persons,' does not employ the words 'obscene' or 'obscenity'. The portrayal of sexual promiscuity in a motion picture may be accomplished with such finesse, or in such a subtle manner, that many would not consider it obscene; yet, by its very adroitness or subtlety promiscuity would be made to appear to a young person to be highly desirable or praiseworthy and acceptable or commonly accepted * * *"

In the action brought in the Federal court challenging the constitutionality of this ordinance, both the District Court for the Northern District of Texas, and the Court of Appeals for the Fifth Circuit recognized its invalidity as written and sought to sustain its constitutionality by redrafting its standards to mean obscene for children.

The Court of Appeals rejected the City's contention that under the authority of *Prince v. Massachusetts*, 321 U.S. 158 (1943), and *Jacobellis v. Ohio*, 378 U.S. 184 (1964), material other than obscenity could be validly restricted as to minors. It stated:

> "* * * As forceful as these arguments may be for the expansion of the scope of the classification standards, the long history of the misuse of the censorship power convinces us that the standard for classification must be restricted to the control of obscenity * * *" (366 F. 2d 590, 598)

The Court of Appeals (Judge Cox dissenting) then concluded that the District Court was correct in limiting the application of the "not suitable for young persons" classification to films that are "obscene when viewed by an audience of young persons". (366 F. 2d at 599)

Judge Cox, in his dissenting opinion, noted:

> "* * * But this Dallas ordinance says nothing about obscenity, and the trial judge gave it a helpful nudge in that direction to provide the basis for the cross appeal here. [By the City of Dallas] But the Court could not by its proviso give, or ascribe to the ordinance something not said or to be found therein * * *" (366 F. 2d at 609)

At issue is the constitutionality of the ordinance as enacted and as construed by the Texas Court rather than the constitutionality of the ordinance with the judicial interpretive surgery performed in the Federal Courts, even if its constitutional defects could have been so cured. The ordinance must be adjudicated on the basis of its construction

by the Texas Court in this litigation. *Kingsley Pictures Corp. v. Regents*, 360 U.S. 684, 688 (1959).

The Texas Court of Civil Appeals, which had the opinion of the Federal District Court before it and to which it referred in its opinion, did not adopt that Court's construction. It refused to limit its interpretation of the ordinance to "obscene when viewed by an audience of young persons," and instead applied the ordinance as broadly as it was written, or, perhaps, even more so. (See Point II, *infra.*) The Supreme Court of Texas did not see fit to review this construction, even though it was fully aware not only of the Federal District Court's limited construction of the ordinance but also the affirmance of that construction by the Court of Appeals for the Fifth Circuit.[13]

As written and as applied in this case by the Texas courts, the ordinance lays a restraint on the exhibition of motion pictures in terms of their content and the ideas they may express. In *Burstyn v. Wilson*, 343 U.S. 495 (1952), this Court, departing from its prior rulings and extending to motion pictures the protection of the First Amendment, noted as a basis therefor:

> "It cannot be doubted that motion pictures are a significant medium of communication of ideas. They may affect public attitudes and behaviour in a variety of ways ranging from a direct espousal of a political or social doctrine to a subtle shaping of thought which characterizes all artistic expression." (343 U.S. at 502)

[13] United Artists filed a Supplemental Motion for Rehearing in the Supreme Court of Texas on September 30, 1966, in which it urged the Court to consider the conflict in the opinions of the Court of Civil Appeals and the opinion of the Court of Appeals for the Fifth Circuit filed on August 30, 1966. (R. 183) This Supplemental Motion was denied on October 19, 1966. (R. 188)

And yet it is precisely that "subtle shaping of thought which characterizes all artistic expression" which Justice Bateman in the court below stressed in applying the ordinance to "VIVA MARIA" and in repulsing the challenge to its constitutionality. He wrote:

> "The portrayal of sexual promiscuity in a motion picture may be accomplished with such finesse, or in such a subtle manner, that many would not consider it obscene; yet, by its very adroitness or subtlety promiscuity would be made to appear to a young person to be highly desirable or praiseworthy and acceptable or commonly accepted [The last being the standards of the ordinance.]." (R. 174.)

The standards of the ordinance to which Judge Bateman referred closely resemble the provisions of the New York statute held invalid by this Court in *Kingsley Pictures Corp. v. Regents, supra.* The New York statute authorized the banning of motion pictures which were "immoral in that they portray acts of sexual immorality as desirable, acceptable or proper patterns of behavior". The New York Court of Appeals upheld the denial of a license to the motion picture "LADY CHATTERLY'S LOVER", even though the picture was concededly not obscene, "because the subject matter is adultery presented as being right and desirable for certain people under certain circumstances". The language of this Court in reversing the New York Court of Appeals is equally applicable to §46A-1(f), particularly as interpreted by Judge Bateman in that portion of his opinion quoted above. Justice Stewart stated:

> "What New York has done, therefore, is to prevent the exhibition of a motion picture because that pic-

ture advocates an idea—that adultery under certain circumstances may be proper behavior. Yet the First Amendment's basic guarantee is of freedom to advocate ideas. The State, quite simply, has thus struck at the very heart of constitutionally protected liberty.

"It is contended that the State's action was justified because the motion picture attractively portrays a relationship which is contrary to the moral standards, the religious precepts, and the legal code of its citizenry. This argument misconceives what it is that the Constitution protects. Its guarantee is not confined to the expression of ideas that are conventional or shared by a majority. It protects advocacy of the opinion that adultery may sometimes be proper, no less than advocacy of socialism or the single tax. And in the realm of ideas it protects expression which is eloquent no less than that which is unconvincing.

"Advocacy of conduct proscribed by law is not, as Mr. Justice Brandeis long ago pointed out, 'a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on.' Whitney v. California, 274 U.S. 357, at 376 (concurring opinion)." (360 U.S. at 688-689)

See also: *Terminiello v. Chicago*, 337 U.S. 1 (1949).

The constitutional right of free speech protects expression of ideas to minors as well as to adults. The Maryland Court of Appeals recognized the necessity of such protection in *Police Commissioner of Baltimore v. Siegel Enterprises*, 233 Md. 110, 120, 162 A. 2d 727, 731 (1960):

"* * * The right of young persons to read what they will, within the limits of permissible State or Federal action, is vital not only to them but to all protected citizenry. The exclusion of obscenity from protected utterance does not carry with it the right to obscure from

young or old facts or events, however unpleasant, disturbing or violent. *It is through realization, in formative years, of the meaning of the ordered liberties protected by the Constitution that an adult citizenry is most apt to have the feelings and thoughts and to take the actions which are 'the real protection against attempts to strait-jacket the human mind.'* Mr. Justice Frankfurter, concurring, Dennis v. United States, 341 U.S. 494, 556 (71 S. Ct. 857, 95 L. Ed. 1137); see Thornhill v. Alabama, 310 U.S. 88, 95 (60 S. Ct. 736, 84 L. Ed. 1093)." (Emphasis added)

Accord: *Katzev v. County of Los Angeles*, 52 Cal. 2d 360, 341 P. 2d 310 (1959); *William Goldman Theatres v. Dana*, 405 Pa. 83, 173 A. 2d 59, cert. den. 368 U.S. 897 (1961); *Commonwealth v. Corey*, ... Mass. ..., 221 N.E. 2d 222 (1966). See also: Comment, "Exclusion of Children from Violent Movies" 67 *Colum. L. Rev.* 1149, 1158 (1967).

The Dallas ordinance, as enacted and as applied by the City and the Texas courts permits the Dallas Board to determine "in its judgment" what ideas are or are not "desirable, respectable, or praiseworthy" for young persons, completely without regard to the obscenity of the material. Such a restraint on protected speech cannot be countenanced.[14]

[14] If the Dallas Motion Picture Classification Board may constitutionally review and pass upon the acceptatbility of ideas for young persons, then so could other boards in cities and towns throughout the country, each making its own judgment as to whether the content of the motion picture was presented as "acceptable" or "proper" for young persons. The Dallas Ordinance has already become a model classification ordinance. Statutes similar to the Dallas ordinance were introduced during the 1967 Legislative sessions in the States of Rhode Island, Alaska, Texas and in the town of Middletown, Pennsylvania. The Judiciary Committee of the Legislative Council of Maryland recently proposed the introduction of an amendment to its censorship statute which would be a "carbon copy" of the Dallas Ordinance.

**B. The grounds for restricting a motion picture as "not suitable for young persons" are vague, indefinite and overbroad.**

This Court has long recognized that standards in statutes or ordinances which authorize restraints upon expression must be "defined with appropriate definiteness." *Winters v. New York*, 333 U.S. 507, 515 (1948). For indeed, if not, the "free dissemination of ideas may be the loser." *Smith v. California*, 361 U.S. 147, 151 (1959). "Precision of regulation must be the touchstone in an area so closely touching our precious freedom." *N.A.A.C.P. v. Button*, 371 U.S. 415, 438 (1963). See also: *Keyishian v. Board of Regents*, 385 U.S. 589, 599 (1967); *Elfbrandt v. Russell*, 384 U.S. 11, 18 (1966), *Baggett v. Bullitt*, 377 U.S. 360, 372, 373 (1964).

Consistently, this Court has thwarted the attempts of censors to exclude motion pictures from public view by setting aside the standards under which the censors had applied their ban as too vague to satisfy constitutional guarantees. In *Burstyn v. Wilson*, 343 U.S. 495 (1952), this Court found the criterion "sacrilegious" so vague as to be offensive to the constitutional guarantee of free expression. This Court similarly invalidated on the score of indefiniteness the standards of the ordinance of Marshall, Texas, which barred the showing of any motion picture which in "the opinion" of the local board of censors was "of such character as to be prejudicial to the best interests of the people of said city." *Gelling v. Texas*, 343 U.S. 960 (1952).

On the authority of *Burstyn*, this Court, in per curiam opinions, invalidated a censor board's commission to license

only motion pictures of "a moral, educational or amusing and harmless character," *Superior Films v. Department of Education*, 346 U.S. 587 (1954), and at the same time voided the direction to the New York State Censor Board to disapprove "immoral" motion pictures or a motion picture of such character that "its exhibition would tend to corrupt morals," *Commercial Pictures v. Regents*, 346 U.S. 587 (1954). Thereafter, on the authority of *Burstyn* and *Superior*, this Court, per curium, reversed the Kansas Censor Board's rejection of a motion picture based on its authorization to disapprove films deemed "cruel, obscene, indecent, immoral or such as tend to debase or corrupt morals," *Holmby v. Vaughn*, 350 U.S. 870 (1955).

The need for precision has not been diminished because the standards governing the censor's reach permit a restraint on dissemination to children rather than adults. This Court has never suggested that vagueness can be a variable concept, changing according to whether the First Amendment rights of children rather than of adults are restrained.[15] Indeed, this Court recently stated that "* * * neither the Fourteenth Amendment nor the Bill of Rights is for adults alone * * *" *In Re Gault*, 387 U.S. 1, 13 (1967); See also *Trimble v. Stone*, 187 F. Supp. 483, 486 (D.D.C. 1960).

[15] See Comment, "Exclusion of Children from Violent Movies," 67 *Colum. L. Rev.* 1149, 1166. Indeed, there may be valid reasons for requiring greater precision in statutes directed to children. Although the precise limits of obscenity which is outside the protection of the First Amendment may be the subject of divergent views among the members of this Court, there has been much history and judicial experience in determining what is "obscene." What is obscene when disseminated to children has no technical or settled legal meaning and there is a paucity of judicial decision on this question.

Concurring in a determination that a New York statute designed to control the dissemination of material to minors was unconstitutionally vague, Judge Fuld of the New York Court of Appeals clearly enunciated the applicable principle:

> "* * * It is, however, essential that legislation aimed at protecting children from allegedly harmful expression —no less than legislation enacted with respect to adults —be clearly drawn and that the standards adopted be reasonably precise so that those who are governed by the law and those that administer it will understand its meaning and application." *People v. Kahan*, 15 N.Y. 2d 311, 313, 206 N.E. 2d 333, 335 (1965).

See also: *William Goldman Theatres, Inc. v. Dana*, 405 Pa. 83, 173 A. 2d 59, Cert. den. 368 U.S. 897 (1961); and *Paramount Film Distributing Corp. v. City of Chicago*, 172 F. Supp. 69 (N.D. Ill. 1959).

The standards contained in the Dallas ordinance for restricting the exhibition of motion pictures as "not suitable for young persons" are not narrowly drawn, reasonable and definite.

Section 46A-1(f)[16] sets forth the standards which the Board must apply in determining whether the exhibition of a motion picture may be restrained as "not suitable for young persons". In determining that a picture is "not suitable" for children, the Board must first determine whether the picture describes or portrays brutality or criminal violence or depravity or nudity or sexual promiscuity or extramarital or abnormal sex relationships. If the picture describes

[16] § 46A-1(f), set out in full *supra*, pgs. 3, 4, and *infra*, App. B.

or portrays any of these phenomena, then the Board must determine whether the portrayal is such that it is likely "to incite or encourage" crime or delinquency or sexual promiscuity on the part of young persons. Because of the disjunctives within the Section, there are 46 different grounds which might result in the classification of a picture,[17] but none is sufficiently precise to withstand constitutional attack.

For example, the terms "sexual promiscuity", "extra-marital relations" and "abnormal sex relations" are unworkably vague. Indeed, the City, in attempting to enforce classification of the motion picture "THE SILENCERS" on the ground of "sexual promiscuity," found that term so imprecise that it later amended the ordinance in an attempt to clarify its meaning.[18]

A similar ground for controlling dissemination of material to minors—"sexual immorality"—was found unconstitutional by the New York Court of Appeals in *People v. Bookcase, Inc.*, 14 N.Y. 2d 409, 201 N. E. 2d 14 (1964).

The vagueness of the standards is not cured by the requirement that the description or portrayal be one which, in the judgment of the Board, is "likely to incite or encourage crime delinquency or sexual promiscuity on the part of young persons." See *Winters v. New York, supra.* The Court there said:

> "* * * The subsection of the New York Penal Law, as now interpreted by the Court of Appeals, prohibits distribution of a magazine principally made up of criminal

[17] See App. B, *infra.*

[18] The amendment is set out in N. 2, *supra.*

> news or stories of deeds of bloodshed, or lust, so massed as to become vehicles for inciting violent and depraved crimes against the person. But even considering the gloss put upon the literal meaning by the Court of Appeals' restriction of the structure to collections of stories 'so massed as to become vehicles for inciting violent and depraved crimes against the person * * *' we find the specification of publications, prohibited from distribution, too uncertain and indefinite to justify the conviction of this petitioner * * *" (333 U.S. at 518-519)

The highest courts of several states have followed the *Winters* rationale in declaring void for vagueness statutes designed to control the dissemination of written material to minors, even though application of those statutes was predicated on the possibility of "incitement." See, e.g. *Police Commissioner of Baltimore v. Siegel Enterprises*, 233 Md. 110, 162 A. 2d 727 (1960), cert. denied, 364 U.S. 909 (1960); *People v. Bookcase, supra; People v. Kahan, supra; Adams v. Hinkle*, 51 Wash. 2d 763, 322 P. 2d 844 (1958); *Katzev v. County of Los Angeles*, 52 Cal. 2d 360, 341 P. 2d 310, 317-318 (1959).

The ordinance conditions application of the phrase "likely to incite or encourage crime delinquency or sexual promiscuity" upon whether "in the judgment of the Board [the motion picture] creates an impression on young persons that such conduct is profitable, desirable, acceptable, respectable, trustworthy or commonly accepted." (Section 46A-1(f)) Instead of clarifying the ambiguity inherent in the initial

phrase, the added condition not only compounds the vagueness of the standards but also provides the Motion Picture Classification Board with a "roving commission" to classify motion pictures. Another local classification ordinance in which the application of standards was similarly conditioned was held invalid in *Paramount Film Distributing Corp. v. City of Chicago*, 172 F. Supp. 69 (N.D. Ill. (1959)). In that case, the phrase "tends to create a harmful impression on the minds of children" was held to render the local ordinance "hopelessly indefinite." *Id.* at 72.

In addition, in *Kingsley Pictures Corp. v. Regents, supra*, this Court invalidated that part of a New York statute which authorized the prohibition of motion pictures which were deemed to portray "acts of sexual immorality * * * * as desirable, acceptable or proper patterns of behavior. Justice Clark, who concurred in this Court's holding that the standard was unconstitutional, did so on the ground that it was "vague and indefinite." In his opinion:

> "What may be to one viewer the glorification of an idea as being 'desirable, acceptable or proper' may to the notions of another be entirely devoid of such a teaching. The only limits on the censor's discretion is his understanding of what is included within the terms 'desirable, acceptable or proper.' This is nothing less than a roving commision in which individual impressions become the yardstick of action, and results in regulation in accordance with the beliefs of the individual censor rather than regulation by law * * * I need only say that the obscurity of the standard presents such a

> choice of difficulties that even the most experienced find themselves at dagger's point." (360 U.S. at 701)

The vice of the restraint on motion pictures in terms so vague as those of the ordinance here was pointed out by Mr. Justice Frankfurter, concurring in *Burstyn, supra*:

> "* * * To allow such vague, undefinable powers of censorship to be exercised is bound to have stultifying consequences on the creative process of literature and art — for the films are derived largely from literature. * * *" (at page 531)

The vagueness of the standards contained in the Dallas ordinance is further aggravated by the numerous grounds upon which exhibition of a motion picture may be restrained as "not suitable for young persons." Because of the disjunctive wording of Section 46-A-1(f), there are forty-six separate and distinct grounds upon which the Board may classify a film. (App. B, *infra.*) This prolixity and profusion creates an overbroad sweep which impairs freedom of expression. *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965); *Keyishian v. Board of Regents*, 385 U.S. 589, 609 (1967); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960). The administrative application of such vague, indefinite and overbroad standards has never been countenanced by this Court.[19]

There is no justification for making an exception with respect to the forty-six vague and indefinite standards contained in Section 46A-1(f) of the Dallas ordinance.

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[19] See Amsterdam, "Void for Vagueness Doctrine in the Supreme Court," 109 *Pa. L. Rev.* 67, 93-94, Notes 140-142 and cases cited therein.

## II.

## THE DALLAS CLASSIFICATION ORDINANCE AS APPLIED IMPOSED AN UNCONSTITUTIONAL RESTRAINT ON EXHIBITION OF THE MOTION PICTURE "VIVA MARIA."

Throughout these proceedings, United Artists has been at a complete loss to determine upon what basis exhibition of the film "VIVA MARIA" was restrained as "not suitable for young persons."

The Motion Picture Classification Board, by the admission of one of its members (R. 63), made no specific finding as to why the film should have been classified as "not suitable for young persons."[20] Testimony at the trial of the case indicated that various members of the Board had voiced different objections to the film, including alleged "sacrilege" (R. 64, 94), alleged portrayal of violence (R. 64, 67, 73-74), and alleged portrayal of sexual promiscuity (R. 67, 71-72, 81-82, 92). In addition it was admitted (R. 60, 70) that only five of the eight Board members who discussed the film and voted in favor of the classification had actually seen "VIVA MARIA."

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[20] The Court of Civil Appeals likewise conceded that the Board, and the trial court as well, had made no specific finding as to why "VIVA MARIA" should have been classified as "not suitable for young persons" (R. 170).

One way to inhibit such a capricious exercise of censorial power would be to require the Board to articulate with specificity the reasons for its decisions. See *American Civil Liberties Union v. City of Chicago*, 13 Ill. App. 2d 278, 286, 141 N.E. 2d 56, 60 (1957); *Capitol Enterprises, Inc. v. City of Chicago*, 260 F. 2d 670, 675, 676 (7th Cir. 1958); *Zenith International Film Corp. v. City of Chicago*, 291 F. 2d 785, 789-790 (1961). See also: *Kent v. United States*, 383 U.S. 541, 561 (1966).

In its petition for a temporary injunction, the City of Dallas took the position that "VIVA MARIA" was a film "* * * portraying sexual promiscuity in such a manner as to be in the judgment of the Board likely to incite or encourage juvenile delinquency or sexual promiscuity on the part of young persons or to appeal to their prurient interests" (R. 3). However, the City offered no convincing evidence in support of its allegations that the film (1) "portray[ed]" sexual promiscuity, *or* that (2) it was likely to incite or encourage (a) juvenile delinquency *or* (b) sexual promiscuity on the part of young persons, *or* that (3) it would appeal to the prurient interests of young persons.

The trial judge articulated no reason for his decision upholding the classification (R. 116-117). Moreover, notwithstanding the express command of the ordinance that motion pictures reviewed thereunder be judged "as a whole" (Section 46A-1(f); R. 121-122), the trial judge reached his decision solely on the basis of "two or three [unspecified] features" in "VIVA MARIA" (R. 116).

The opinions of the Court of Civil Appeals are not appreciably more helpful. One justice thereof thought that "VIVA MARIA" was, in the alternative, (1) "not suitable" under the Standards of the Ordinance as enacted; (2) obscene under the constitutional tests enunciated by this Court; and, (3) obscene if such tests were modified so that the film would be "judged by the average young person" (R. 170), even though he conceded that the film might possess some social value for persons under the age of 16 years (R. 171). The other justice held that "VIVA MARIA" could properly be classified as "not suitable" under the standards

of the ordinance as enacted (R. 174-175). The opinions of both justices are conclusory only, and contain no discussion whatsoever of the film's content.

The Supreme Court of Texas refused to issue writs of error, finding, without even having viewed the film, that there was "no error requiring reversal" (R. 182).

In short, the record in this case indicates that "VIVA MARIA" might have been (but not that it was) classified (1) on the basis of any one of the 46 separate and distinct grounds contained in the ordinance (see App. B, *infra*), or (2) on the basis of some imprecise and faintly articulated variation of standards enunciated by some members of this Court, or that (3) some members of the Dallas Motion Picture Classification Board may even have reached beyond the terms of the ordinance itself to employ a constitutionally impermissible standard ("sacrilege") in finding the film "not suitable for young persons."

As this Court has repeatedly emphasized in cases of this type, where a restraint involves possible infringement of the First Amendment guarantee of free expression, this Court must make its own "independent constitutional judgment on the facts of the case" to determine whether the restraint is constitutionally permissible. See, e.g., *Jacobellis v. Ohio*, 378 U.S. 184, 187-190 (1964). See also: *New York Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964).

A viewing of "VIVA MARIA" shows that the film is composed of a succession of so-called "sight gags" and one-line jokes of a completely innocuous nature. One of its heroines leads a comic opera revolution with absolute ease;

the other swings through the trees with all the aplomb of Tarzan. Its villains are ludicrously villainous, from an evil ranchero whom Pearl White would have dispatched quickly to an overdressed military dictator slowed down by the weight of his medals. The film is intended, to use the words of Bosley Crowther, film critic for *The New York Times*, as nothing more than "light-hearted fun" (R. 151).

(A) *"VIVA MARIA" is not obscene.* The members of this Court have enunciated various tests by which the constitutional obscenity of material is to be judged. See *Redrup v. New York*, 386 U.S. 767, 770-771 (1967). Whichever of these tests is applied in judging the film "VIVA MARIA," it is clear that it could not possibly be found obscene in the constitutional sense. Indeed, the City of Dallas has never contended that the film is obscene. The alternative holding to the contrary by one justice of the Court of Civil Appeals is patently erroneous.

(B) *"VIVA MARIA" is not obscene when viewed by persons under the age of 16 years.* Throughout these proceedings, the City of Dallas has neither contended nor introduced evidence to show that "VIVA MARIA" would be obscene when viewed by persons under the age of 16 years. Indeed, the City has consistently contended exactly the opposite: that in applying the ordinance to "VIVA MARIA" it was aiming at something less than obscenity, regardless of the age of the audience. (See page 26, supra.)

This Court has previously held that the burden is on those who seek to restrain expression to prove that the restraint is constitutionally permissible. *Freedman v. Mary-*

*land*, 380 U.S. 51, 58 (1965). The City of Dallas has not met that burden in this case.

If the prurient interest appeal of the material is to be judged on any basis other than its appeal to the "normal, average" adult, it must first be shown that the material was designed for or primarily disseminated to the limited group upon the basis of whose prurient interests the appeal of the material is to be judged. *Mishkin v. New York*, 383 U.S. 502 508-510 (1966); *United States v. 56 Cartons Containing 19,500 Copies of a Magazine Entitled "Hellenic Sun,"* 373 F. 2d 635, 640-641 (4th Cir. 1967);[21] Lockhart and McClure, "Censorship of Obscenity: The Developing Constitutional Standards," 45 *Minn. L. Rev*, 5, 77-79, 82 (1960); [22] and, American Law Institute, *Model Penal Code*, 1962 Proposed Official Draft, Section 251.4(1).[23] There is no evidence in the record which would show that "VIVA MARIA" was primarily directed to persons under the age of 16 years; the City of Dallas has never so contended, and the Court of Civil Appeals did not so find.

[21] Petition for certiorari filed on other issues. 35 U.S.L. Week 3413 (U.S. May 15, 1967).

[22] According to Lockhart and McClure, "variable obscenity requires first a determination of the audience to which the material is primarily directed * * *" *Id.* at 78-79. Although in a later section of their article, *Id.* at 85-88, the authors speculate that this Court might uphold legislation prohibiting minors from viewing material not primarily directed to them, they offer no reason in support of their speculation. Indeed, such speculation is inconsistent with the "primary audience" concept upon which they base their theory of "variable obscenity."

[23] The relevant portion of Section 251.4(1) provides as follows: "* * * Predominant appeal shall be judged with reference to ordinary adults unless it appears from the character of the material or the circumstances of its dissemination to be designed for children or other specially susceptible audience * * *"

Assuming that the material is primarily directed to the group upon the basis of whose prurient interests the appeal of the material is to be judged, it must also be shown that the material does in fact appeal to the prurient interests of that group. *Mishkin v. New York, supra,* at 509-510; *United States v. Klaw,* 350 F. 2d 155, 165-168 (2d Cir. 1965). There is no competent evidence in the record which would show that "VIVA MARIA" appeals to the prurient interests of persons under the age of 16 years.

In addition, it must be shown that "the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters." *Memoirs v. Massachusetts,* 383 U.S. 413, 418 (1966); *Manual Enterprises, Inc. v. Day,* 370 U.S. 478, 486 (1962). There is nothing in the record which would show that "VIVA MARIA" is patently offensive to persons under the age of 16 years or that it affronts the prevailing standards of the adult community as to what is suitable for persons under the age of 16 years.

Finally, it must be shown that the material is "utterly without redeeming social value." *Memoirs v. Massachussetts, supra,* at 418. The social value of the material cannot be weighed against its prurient interest appeal. *Id.* at 419. In the case at bar, the City did not attempt to show that "VIVA MARIA" was utterly without redeeming social value as to persons under the age of 16 years. Indeed, both witnesses Gilliland and Maceo, and perhaps the Court of Civil Appeals, conceded that the film had some social value as to such persons. Clearly, in such a situation it cannot be said that "VIVA MARIA" is utterly without redeeming social

value as to persons under the age of 16 years. Douglas, J., concurring in *Memoirs v. Massachusetts, supra,* at 426; *Attorney General v. A Book Named "Naked Lunch,"* ....Mass....., 218 N.E. 2d 571 (Sup. Jud. Ct. 1966); *City of Phoenix v. Fine,* 420 P. 2d 26, 30 (Ariz. Ct. App. 1966).

In short, the City of Dallas has never contended that "VIVA MARIA" would be obscene when viewed by persons under the age of 16 years. The alternative holding to the contrary by one justice of the Court of Civil Appeals is supported neither by the film itself nor by the record in this case, and therefore cannot stand.

(C) *"VIVA MARIA" cannot constitutionally be classified as "not suitable for young persons" under the terms of Ordinance No. 11284.* Section 46A-1(f) sets forth 46 separate and distinct grounds upon which the Dallas Motion Picture Classification Board may base a "not suitable" classification. (App. B, *infra.)*

Although the Board itself never specified any reason for its classification of "VIVA MARIA," testimony at the trial of the case in the District Court of Dallas County indicates that various members of the Board advanced at least three reasons therefor: (1 ) alleged "sacrilege," (2) alleged portrayal of violence, and (3) alleged portrayal of sexual promiscuity.

"Sacrilege" is not a constitutionally permissible ground upon which to restrain speech, *Burstyn v. Wilson,* 343 U.S. 495 (1952), nor is such a ground even set fourth in Section 46A-1(f). The fact that it cannot be said with certainty that the classification of "VIVA MARIA" was not based in whole or in part on such an invalid ground is by itself

sufficient to require reversal of the judgment below. *Terminiello v. Chicago*, 337 U.S. 1, 5-6 (1949); *Stromberg v. California*, 283 U.S. 359, 368 (1931).

Board member Gilliland indicated that he thought "VIVA MARIA" fell under those portions of Section 46A-1(f) which deal with violence. However, both he and Board member Maceo admitted that whatever violence the film contained was of a ludicrous and exaggerated sort which no one would take seriously or could reasonably relate to actual human experience. (R. 64-65, 67-68, 88-91.) As the film itself shows, the violence portrayed therein is of the innocuous slapstick variety which has met with widespread public acceptance and appreciation from the early films of Mack Sennett to the latest cartoons of Walt Disney. Indeed, Mr. Gilliland admitted that his only objection to the film's portrayal of violence was the involvement of the clergy therein (R. 64). It would therefore have been clearly unconstitutional to sustain the classification of "VIVA MARIA" on the basis of the violence portrayed therein.

Board members Gilliland and Maceo[24] both testified that in their opinion "VIVA MARIA" would tend to create the impression on "young persons" that sexual promiscuity was commonly accepted. As each admitted, however, the film does not "describe" or "portray" sexual promiscuity but at most merely implies it—an implication which they read into the film on the basis of their experience as adults.

[24] Mr. Gilliland's sole qualification as an expert witness apparently was that he was the father of two children (R. 60). Reverend Maceo's qualifications were only slightly less dubious (R. 85-86). See *Hewitt v. Maryland State Board of Censors*, 243 Md. 574, 221 A. 2d 894 (1966); *State v. Watson*, ..... Ore. ....., 414 P. 2d 337 (1966).

Neither was asked to view the film from the perspective of a person under the age of 16 years. Moreover, the Court of Civil Appeals did not find, but apparently merely assumed, that the film "described" or "portrayed" sexual promiscuity.[25] Classification of "VIVA MARIA" for "describing" or "portraying" sexual promiscuity, as the terms of Section 46A-1(f) expressly require, was therefore a clearly erroneous, overbroad and unconstitutional application of the ordinance. See *Thompson v. Louisville*, 362 U.S. 199 (1960).

Briefly, the film "VIVA MARIA" is no more, and perhaps less, violent than the Western films which persons under the age of 16 years may view daily both in motion picture theatres and on television. Sexual promiscuity is never expressly "described" or "portrayed" therein; at most, there are a few vague, allusions thereto. Upon such a showing, the Board cannot sustain its classification of "VIVA MARIA" as "not suitable for young persons" under the terms of Ordinance No. 11284. To permit it to do so would, in effect, empower the Board to exclude persons under the age of 16 years from almost any movie, a result which appellant United Artists believes the Constitution and this Court would never permit.

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[25] Chief Justice Dixon held that "the implied findings of the Board and the district court" that the film was obscene were "amply" supported by the evidence (R. 170). However, neither the Board, the City nor the trial judge had ever intimated that they considered the film obscene.

Associate Justice Bateman held that the film was properly classified under the terms of the ordinance (R. 174-175).

## III.

## THE DALLAS CLASSIFICATION ORDINANCE IS VOID ON ITS FACE FOR FAILURE TO PROVIDE THE PROCEDURAL SAFEGUARDS REQUIRED BY THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND BY PRIOR DECISIONS OF THIS COURT.

Under the terms of Ordinance No. 11284, it is unlawful "[t]o exhibit any film which has not been classified as provided in this ordinance." (Section 46A-4(a)(1); R. 125) The ordinance imposes criminal sanctions against "young persons" and exhibitors who do not comply with its submission, exhibition, admission and advertising requirements at the rate of $200.00 for each offense, with each day of non-compliance constituting a separate offense. (Section 46A-11.2; R. 133) In addition, the City Council may under certain circumstances revoke an exhibitor's license to show motion pictures which have been classified as "not suitable for young persons." (Section 46A-6; R. 127-128) Insofar as relevant to the instant appeal, the ordinance establishes the following classification procedures:

> (1) Before any motion picture may be exhibited within the city limits of the City of Dallas, an exhibitor must file a "proposed classification" with the Dallas Motion Picture Classification Board. (Section 46A-3(a); R. 124)
>
> (2) The Board must act within five (5) days thereafter, and may direct that the film be projected for consideration by the Board at "the earliest time practicable." (Setcion 46A-3(a, b); R. 124)
>
> (3) If a screening is held, the Board must issue its classification order within two (2) days thereafter, and

notice of such order must be sent "to the exhibitor involved and to any other exhibitor who shall request such notice." (Section 46A-3(b, d); R. 124-125)

(4) "Within two (2) days after the filing of any classification by the Board, other than an order approving the classification proposed by an exhibitor, any exhibitor may file a notice of non-acceptance of the Board's classification, stating his intention to exhibit the film in question under a different classification. Thereupon it shall be the duty of the Board to do the following:

> "(1) Within three (3) days thereafter to make application to a District Court of Dallas County, Texas, for a temporary and a permanent injunction to enjoin such defendant-exhibitor, being the exhibitor who contests the classification, from exhibiting the film in question contrary to the provisions of this ordinance." (Section 46A-7(a); R. 128-129)

(5) If the District Court fails to issue an injunction within ten (10) days of the filing of the notice of non-acceptance, the Board's classification order is suspended automatically. (Section 46A-7(b); R. 131)[26]

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26. It will therefore be seen that the Ordinance allows in excess of 19 days (5 + X + 2 + 2 + 10 days) to elapse between submission of the "proposed classification" and a judicial determination on the merits in the court of initial jurisdiction. In the instant case, 26 days elapsed between submission of the proposed classification (January 24, 1966) and issuance of a temporary injunction by the District Court of Dallas County (February 18, 1966).

Although under the express terms of Section 46A-7(b) the Board's classification order is suspended automatically if the District Court fails to issue an injunction within ten days of the filing of the notice of non-acceptance, in practice this provision has proved meaningless.

For example, a notice of non-acceptance of the Board's "not suitable" classification of "BLOOD AND BLACK LACE" was filed on February 11, 1966. The City's request for a temporary injunction was *denied on* February 18, 1966. Although under Section 46A-7(b) the classification order should have been suspended since no injunction issued within ten days, a permanent injunction prohibiting exhibition of the film to persons under the age of 16 years was issued on March 24, 1966, forty-one days after the filing of a notice of non-acceptance. *City of Dallas v. Rowley United Theatres, Inc.*, District Court of Dallas County, 101st Judicial District, Case No. 66-1281-E.

(Footnote continued on following page)

(6) "Failure of any exhibitor to file the notice of non-acceptance within two (2) days as required in Subdivision (1) [sic] of this Section 46A-7, shall constitute acceptance of such classification order and such exhibitor shall be bound by such order in all subsequent proceedings except such proceedings as may be had in connection with any application for change of classification under Subdivision (c) of Section 46A-3 above." (Section 46A-7(c); R. 131-132)

**A. *The Dallas Ordinance is void on its face for failure to require a judicial determination that a motion picture is "not suitable for young persons" before its exhibition may be restricted in accordance with such a classification.***

It is no longer open to question that "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963); *Freedman v. Maryland*, 380 U.S. 51, 57 (1965).

In *Freedman*,[27] this Court held that an administrative procedure for prior review of films is valid only if:

(1) there is a guarantee of judicial participation before exhibition of a film is restrained on the basis of its content (380 U.S. at 55, 58-59);

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(Footnote continued from preceding page)

Similarly, a notice of non-acceptance of the Board's "not suitable" classification of "THE SILENCERS" was filed on March 4, 1966. On March 15, 1966, when neither a temporary nor permanent injunction had issued, a motion to dismiss was made on the ground that no injunction had issued within ten days, as required by Section 46A-7(b). This motion was denied. Indeed, on May 4, 1966, two months after the filing of the notice of non-acceptance, the City took the position that "the original classification given to said film as being 'not suitable for young persons' remains in full force and effect." *City of Dallas v. Interstate Circuit, Inc.*, District Court of Dallas County, 14th Judicial District, Case No. 66-1928-A.

[27] The City has recognized the applicability of the *Freedman* case, stating: "The Dallas Motion Picture Classification Ordinance,

(Footnote continued on following page)

(2) "the burden of instituting judicial proceedings" rests on the censor *(Id.* at 59-60);

(3) the censor bears the burden of proving that his decision was correct *(Id.* at 58);

(4) "[a]ny restraint imposed in advance of a final judicial determination on the merits [is] * * * limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution" (*Id.* at 59); and

(5) "a prompt final judicial decision" is assured (*Id.* at 59).

The *Freedman* case struck down a censorship statute which in practice "lent an effect of finality to the censor's determination." 380 U.S. at 58. With respect to the first of the constitutional requirements enumerated above, Mr. Justice Brennan observed for a majority of this Court that:

> "* * * The teaching of our cases is that, because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression only a procedure *requiring* a judicial determination suffices to impose a valid final restraint. [Citing cases.] To this end, the exhibitor must be *assured*, by statute or authoritative judicial construction, that the censor will, within a specified brief period, either issue a license or go to court to restrain showing the film." (380 U.S. at 58-59) (emphasis added).

Contrary to *Freedman*, Ordinance No. 11284 does not guarantee a judicial determination that a particular film may properly be classified as "not suitable for young persons."

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(Footnote continued from preceding page)
both on its face and as applied in this case, complies with the requirements as set forth by this Court in Freedman v. State of Maryland, 380 U.S. 51." (City's Motion to Dismiss United Artists' Appeal, Page 11.) Of course, City's recognition of the applicability of *Freedman* does not mean that the ordinance complies with the requirements set forth therein.

Instead, it conditions the institution of judicial proceedings upon the filing of a "notice of non-acceptance" by "any exhibitor," and creates a presumption that failure to file such notice constitutes knowing acceptance of the Board's classification. (Section 46A-7(a,c); R. 128, 131-132) Unless the notice of non-acceptance is filed in the manner prescribed by the ordinance, the City of Dallas is permitted to restrain exhibition of a film as "not suitable for young persons" without specifying any reason for the film's classification and without sustaining any burden of proof that the classification is constitutionally permissible.

United Artists contends that the City of Dallas cannot constitutionally condition its institution of judicial proceedings upon the filing of a notice of non-acceptance, and that the provision in Ordinance No. 11284 requiring such notice is unconstitutional on its face.

An attempt by the Federal Government to restrain the exercise of a First Amendment right by the imposition of a condition precedent apposite to the filing of a notice of non-acceptance was held invalid by this Court in *Lamont v. Postmaster General*, 381 U.S .301 (1965). At issue in *Lamont* was the constitutionality of a federal statute, as construed and applied, under which the Post Office Department was directed to detain "communist political propaganda" of foreign origin until the addressee thereof expressly indicated his desire to receive it. By regulation, "When it is determined that a piece of mail is 'communist political propaganda,' the

addressee is mailed a notice identifying the mail being detained and advising that it will be destroyed unless the addressee requests delivery by returning an attached reply card within 20 days." 381 U.S. at 303. In addition, "a notice is sent and must be returned for each individual piece of mail desired." *Ibid.* The Post Office Department presumed that those not returning the reply card did not want the identified publication or any similar one arriving in the future. *Id.* at 304.

This Court held unanimously that the statute, as construed and applied, violated the First Amendment. In the opinion of the Court, Mr. Justice Douglas wrote:

> "We conclude that the Act as construed and applied is unconstitutional because it requires an official act (*viz.*, returning the reply card) as a limitation on the unfettered exercise of the addressee's First Amendment rights." (381 U.S. at 305)
>
> * * *
>
> "We rest on the narrow ground that the addressee in order to receive his mail must request in writing that it be delivered. This amounts in our judgment to an unconstitutional abridgment of the addressee's First Amendment rights. The addressee carries an affirmative obligation which we do not think the Government may impose on him. This requirement is almost certain to have a deterrent effect, especially as respects those who have sensitive positions." (381 U.S. at 307)

Mr. Justice Brennan, in whose concurring opinion Mr. Justices Goldberg and Harlan joined, noted that:

> "* * * the Government argues that, since an addressee taking the trouble to return the card can receive the

> publication named in it, only inconvenience and not abridgment is involved. But inhibition as well as prohibition against the exercise of First Amendment rights is a power denied the government. See, e.g., Freedman v. Maryland, 380 U.S. 51; Garrison v. Louisiana, 379 U.S. 64; Speiser v. Randall, 357 U.S. 513." (381 U.S. at 309)

Similarities are striking between the statutes and regulations involved in *Lamont* and the ordinance involved in the instant appeal: (1) each requires an affirmative act as a condition precedent to the exercise of a First Amendment right—mailing a reply card to the Post Office in one case and filing a notice of non-acceptance in the other; (2) in each case the affirmative action required of the addressee or exhibitor avoids immediate prohibiton or restriction only at a cost of inconvenience and inhibition heretofore held to be beyond governmental authorty; and, (3) it was presumed by the Post Office that failure to mail the reply card signified that the addressee did not desire to receive the detained material, whereas here the City of Dallas presumes that, in the absence of a notice of non-acceptance, the exhibitor agrees with the Board's "not suitable" classification of a particular motion picture, despite the fact that the exhibitor submitted such picture as "suitable."

There is sound reason, of course, for placing on the censor not only the burden of proof but also the burden of instituting judicial proceedings in every case to determine whether exhibition of a particular motion picture may con-

stitutionally be restrained.[28] For, as Mr. Justice Brennan pointed out in *Freedman*:

> "Without these safeguards it may prove too burdensome to seek review of the censor's determination. Particularly in the case of motion pictures, it may take very little to deter exhibition in a given locality. The exhibitor's stake in any one picture may be insufficient to warrant a protracted and onerous course of litigation. The distributor, on the other hand, may be equally unwilling to accept the burdens and delays of litigation in a particular area when, without such difficulties, he can fully exhibit his film in most of the rest of the country * * *" (380 U.S. at 59).

To fully appreciate the wisdom of this forecast, one need only review the record of the Dallas Motion Picture Classification Board to see how final the censor's determination has been in the absence of a requirement that the City institute judicial proceedings with respect to each motion picture

[28] And indeed, except with respect to this ordinance, every court which has construed *Freedman* has interpreted it to require a judicial determination in every case. See, e.g., *Cambist Films, Inc. v. Board of Regents of the University of the State of New York*, 46 Misc. 2d 513, 260 N.Y.S. 2d 804, 809 (Sup. Ct. 1965); *State v. Columbia Pictures Corp.*, 197 Kan. 448, 417 P. 2d 255 (1966); *Reade v. City of Chicago*, United States District Court, Northern District of Illinois, Eastern Division, Case No. 67 C 322 (March 10, 1967) (memorandum opinion of Judge Bernard Decker) (not officially reported; *Embassy Pictures Corp v Hudson*, 242 F. Supp. 975, 977 (W.D. Tenn. 1965); *Smith v. Crumlish*, 207 Pa. Super. 516, 218 A. 2d 596, 600 (1966); *Trans-Lux Distributing Corp. v. Maryland State Board of Censors*, 240 Md. 98, 213 A. 2d 235 (1965); *United States v. One Book Entitled "The Adventures of Father Silas,"* 249 F. Supp. 911, 919 (S.D.N.Y. 1966); *United States v. Reliable News Company*, 376 F. 2d 803, 805 (4th Cir. 1967).

claimed to be "not suitable for young persons." (App. C, *infra*.)[29]

In the instant case, had Interstate for its own reasons failed, or merely by inadvertence neglected, to file a notice of non-acceptance of the Board's classification order, exhibition of "VIVA MARIA" would have been finally restricted as "not suitable for young persons" by mere majority vote of an administrative board (only five of the nine members of which had even seen the film), without any specification of the reason or reasons for its classification, and without any judicial determination that the film could constitutionally be so classified. Enforcement of such restrictions in the absence of judicial participation has previously been held impermissible by this Court. *Freedman v. Maryland*, *supra*, at 55, 58-59; *A Quantity of Books v. Kansas*, 378 U.S. 205, 210, 212-213 (1964); *Bantam Books, Inc. v. Sullivan*, 372 U. S. 58, 71 (1963); *Marcus v. Search Warrant of Property*, 367 U.S.

[29] In summary, Appendix C shows that the Dallas Motion Picture Classification Board has classified as "not suitable for young persons" 32 motion pictures for which an exhibitor submitted, and did not voluntarily change, a proposed classification of "suitable for young persons." The City of Dallas has instituted judicial proceedings with respect to only four of these pictures. *City of Dallas v. Rowley United Theatres, Inc.*, District Court of Dallas County, 101st Judicial District, Case No. 66-1281-E ("BLOOD AND BLACK LACE") (petition filed February 14, 1966; permanent injunction issued March 24, 1966); *City of Dallas v. Interstate Circuit, Inc.*, District Court of Dallas County, 44th Judicial District, Case No. 66-1280-B ("VIVA MARIA") (petition filed February 14, 1966; temporary injunction issued February 18, 1966); *City of Dallas v. Interstate Circuit, Inc.*, District Court of Dallas County, 14th Judicial District, Case No. 66-1928-A ("THE SILENCERS") (petition filed March 7, 1966; no injunction issued); *City of Dallas v. Trans-Texas Theatres, Inc.*, District Court of Dallas County, 68th Judicial District, Case No. 66-9900-C ("THE LIQUIDATOR") (petition filed October 17, 1966; permanent injunction issued October 21, 1966).

717, 729-738 (1961). Cf. *Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1957).

In short, the prior decisions of this Court hold that where a right "of constitutional stature" is involved, a government may not condition its exercise upon "the exaction of a price." *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967). By conditioning its institution of judicial proceedings upon the filing of a notice of non-acceptance, the City of Dallas exacts such an inhibitory price. The provision in Ordinance No. 11284 which imposes such a condition precedent is therefore void on its face.[30]

**B. *The Dallas Ordinance is void on its face for failure to accord due process to the distributor of a motion picture.***

It has long been recognized that the constitutional right of free expression embraces not only production and publica-

[30] The provision in the Dallas ordinance requiring the filing of a notice of non-acceptance is in no way analogous to the procedure employed by the Bureau of Customs in preventing the importation of obscene material. 46 Stat. 688 (1930), 19 U.S.C. §1305 (1964), 19 C.F.R. §§9.12(d), 12.40-41 (1966). Under administrative regulations, Customs officials are permitted to solicit assent to forefeiture by the claimant. The practice has been for Customs to mail a blank assent to forfeiture to the claimant, and to advise him that he may either assent or contest the Customs determination that the material is obscene. If the claimant does nothing—i.e., fails to return an executed assent to forfeiture—it is presumed that he wishes to contest the Customs determination and the matter is then referred to the appropriate United States Attorney for the institution of judicial proceedings. 19 C.F.R. §12.40(c,e) (1966). Thus, under the Customs procedure inaction by the claimant creates a presumption in favor of the material, whereas under the Dallas Ordinance inaction by the exhibitor creates a presumption against the film and in favor of the Board's classification. There is, of course, a considerable constitutional difference between imposing a condition precedent to the *surrender* of a First Amendment right, as the Custom procedure does, and imposing a condition precedent to the *exercise* of a First Amendment right, as the Dallas Ordinance does.

tion, but distribution, circulation, exhibition and sale as well. See, e.g., *Lovell v. Griffin*, 303 U.S. 444, 452 (1938); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 64n.6 (1963). It has also long been recognized that the distributor of a film or publisher of a book suffers direct, palpable and legal injury when there is interference with the exhibition of its film or sale of its book. See, e.g., *Bantam Books, Inc. v. Sullivan, supra; Corsican Productions v. Pitchess*, 338 F. 2d 441 (9th Cir. 1964); *Embassy Pictures Corp. v. Hudson*, 226 F. Supp. 421, 424-425 (W.D. Tenn. 1964); *Kingsley International Pictures Corp. v. Blanc*, 396 Pa. 448, 153 A. 2d 243, 246 (1959). See also: *Pierce v. Society of Sisters*, 268 U.S. 510, 535-536 (1925); *Truax v. Raich*, 239 U.S. 33, 38-39 (1915).

Classification of "VIVA MARIA" as "not suitable for young persons," thereby limiting the audience for the film (Section 46A-4; R. 125-127), resulted in direct and immediate injury to United Artists. Because the revenue derived by a distributor from the exhibition of its film is generally dependent upon box-office receipts (I. Ex. 1; R. 101, 146-147), the mandatory exclusion of a portion of the potential audience for a film undoubtedly has a detrimental financial impact upon the distributor. Moreover, since all subsequent runs would be subject to the same audience restriction, classification of a film as "not suitable for young persons" may also affect the distributor's ability to secure subsequent bookings for the film in question. Indeed, "VIVA MARIA" never enjoyed a subsequent run in the City of Dallas.

Notwithstanding United Artists' immediate and continuing constitutional interest in the unfettered exhibition of "VIVA MARIA," the City gave it no notice of any action taken or to be taken by the Classification Board with respect to "VIVA MARIA," did not join United Artists as a party defendant in the injunction proceeding after Interstate filed its timely notice of non-acceptance, and even resisted United Artists' intervention in such proceeding (R. 31-33). For, the ordinance does not accord any rights thereunder to the distributor of a motion picture. Proposed classifications of motion pictures may be filed only by exhibitors. (Section 46A-3(a); R. 124) Notice of classsification orders filed by the Board need be given only to exhibitors. (Section 46A-3(d); R. 125) Notices of non-acceptance may be filed only by exhibitors. (Section 46A-7(a); R. 128) Applications for reclassification of motion pictures previously classified may be filed only by exhibitors. (Section 46A-3(c); R. 124-125)[21] And in the event of a judicial proceeding, the City need join only an exhibitor as the sole defendant. (Section 46A-7(a)(1); R. 128-129) Moreover, if a distributor intervenes in a judicial proceeding by filing an Answer in Intervention, the City is fully entitled to seek

[21] Of course, even if the distributor could apply for reclassification of a film previously classified, which he cannot do under the Dallas Ordinance, this would not excuse the City's failure to recognize his interest in the initial classification proceedings. For, as Section 46A-3(c) makes clear, applicants for reclassification of a film previously classified must bear burdens they would not have had to bear as parties in the initial proceeding. See *Armstrong v. Manzo*, 380 U.S. 545, 551 (1965).

to have it stricken, since the distributor can remain a party only by judicial sufferance and not by right.[32]

This Court has repeatedly held that persons whose legal rights are to be determined by administrative or judicial proceedings are constitutionally entitled to notice thereof and an opportunity to be heard. See, e.g., *Armstrong v. Manzo*, 380 U.S. 545, 550 (1965); *Schroeder v. City of New York*, 371 U.S. 208, 211-214 (1962); *Mullane v. Central Hanover Bank*, 339 U.S. 306, 314-315 (1950). See also: *Bantam Books, Inc. v. Sullivan*, supra, at 71. The Dallas ordinance's failure to require such notice and provide an opportunity for a distributor to be heard renders it void on its face.

That United Artists did, in this case, receive some informal notice of the City's suit against Interstate is obvious from its intervention therein. But such a happenstance can be no substitute for the due process requirement that the distributor of a motion picture be given direct, formal and specific notice of the date and nature of any proceeding vitally affecting its constitutional rights. *In re Gault*, 387

[32] Rule 60, Texas Rules of Civil Procedure, provides: "Any party may intervene, subject to being stricken out by the court for sufficient cause on the motion of the opposite party; and such intervenor shall, in accordance with Rule 72, notify the opposite party or his attorney of the filing of such pleading within five days from the filing of same." Trial courts have wide discretion in determining what constitutes sufficient cause to strike an intervenor. See, e.g., *Mulcahy v. Houston Steel Drum Company*, 402 S.W. 2d 817 (Tex. Civ. App. 1966).

The Court of Civil Appeals at Dallas has already indicated its indifference to the right of a distributor to participate in proceedings under the ordinance (R. 171).

U.S. 1, 31-34 (1967); *City of New York v. New York, New Haven & Hartford Railroad Co.*, 344 U.S. 293, 297 (1953).

Pragmatic constitutional considerations argue strongly for recognition in the Dallas ordinance of a distributor's First Amendment rights. For example, there may be instances in which an exhibitor proposes a classification of "not suitable for young persons," even though the distributor believes that the motion picture is "suitable for young persons." In all likelihood, the classification proposed by the exhibitor in such case will become effective (Section 46A-3(a); R. 124), thereby prohibiting the admission of persons under the age of 16 years to view the film and forcing all advertisements for the film to carry the legend "not suitable for young persons." The distributor would then have no recourse and could not contest the classification proposed by the exhibitor. Similarly, if an exhibitor for his own reasons should fail or by mere inadvertence neglect to file a notice of non-acceptance of a classification order entered by the Board, the Board's classification would become binding without any judicial determination that it is constitutionally permissible. Here, too, the distributor would be powerless to protest.

It is obvious that the interests of the exhibitor and the distributor may differ in these circumstances. The exhibitor who is prevented by the Board's classification from selling a few tickets may not sustain sufficient economic injury to induce him to seek vindication of his right to show the film without restriction. The distributor has the greater economic stake, because classification of a particular film

reduces his income from the exhibition of that film at every theatre within the City of Dallas at which it is shown, and may even result in the refusal of some theatres to show the film at all. Unless the distributor is accorded the right under the ordinance to notice and an opportunity to defend his motion picture, infringements of his First Amendment rights may too often go unremedied. See *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 64n.6 (1963).

## CONCLUSION

On each and every of the foregoing grounds, Appellant United Artists Corporation prays that said judgment of the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas be reversed.

Respectfully submitted,

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## PROOF OF SERVICE

I, Dan McElroy, one of the attorneys for United Artists Corporation, Appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 30 day of September, 1967, I served copies of the foregoing Brief of the Appellant United Artists Corporation on the following parties by depositing the same in the United States mail box, with first class postage prepaid, addressed to counsel of record for Appellee City of Dallas and Appellant Interstate Circuit, Inc. at the following post office addresses, respectively:

1. To Appellee City of Dallas:

   Mr. N. Alex Bickley, City Attorney
   Room 501, Municipal Building
   Dallas, Texas 75201

2. To Appellant Interstate Circuit, Inc.:

   Mr. Grover Hartt
   Mr. Edwin Tobolowsky
   Tobolowsky, Hartt, Schlinger & Blalock
   Room 3525 Southland Center
   Dallas, Texas 75201

Dan McElroy

DAN MCELROY,
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*An Attorney for Appellant,*
*United Artists Corporation.*

## Dallas City Ordinance No. 11,284

An Ordinance Providing for the Amendment of Chapter 46 of the 1960 Revised Code of Civil and Criminal Ordinances of the City of Dallas by adding thereto a new chapter known as Chapter 46A; Providing for the establishment of a Motion Picture Classification Board; Outlining classification procedures; Defining Offenses relating to the exhibition of films classified "Not Suitable for Young Persons"; Providing for the issuance, revocation and suspension of licenses; Providing for judicial review; Defining public nuisances; Providing for injunctive relief; Providing for an exception to State law; providing for a severability clause; Providing for a Penalty; Providing for the repeal of Ordinance No. 10963 enacted by the City Council on April 5, 1965, and enacting this ordinance in lieu thereof; and Declaring an Emergency.

WHEREAS, the City Council after investigation on the part of the members of said Council and the hearing of evidence and testimony at a public hearing called for that purpose, if of the opinion and finds that certain commercially produced motion picture films are one of the contributing causes to juvenile delinquency, sexually promiscuous behavior, and along with other factors, tend to incite criminal behavior on the part of young persons; and

WHEREAS, the City Council is of the opinion that legislative action should be taken by this Council for the pur-

pose of classifying the movies to which said young persons of school age are admitted without proper supervision; and

WHEREAS, the City Council is of the opinion and finds that a great portion of said movies are available for screening and for showing more than thirty days prior to their initial exhibition and that the benefits to the public will far exceed the burden placed upon the motion picture industry by having said movies screened and classified; and

WHEREAS, the City Council is of the opinion and finds that motion picture films possess a greater capacity for good and for evil among young persons of school age than most other modes of expression and are, therefore, affected with a public interest; Now, Therefore,

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF DALLAS:

SECTION 1. That Chapter 46 of the 1960 Revised Code of Civil and Criminal Ordinances of the City of Dallas, be, and is hereby amended by adding thereto a new chapter known as Chapter 46A, consisting of Section 46A-1 through 46A-11 inclusive, which shall read as follows:

## CHAPTER 46A

## MOTION PICTURE CLASSIFICATION ORDINANCE

§ 46A-1 Definition of Terms

§ 46A-2 Establishment of Classification Board

§ 46A-3 Classification Procedure

§ 46A-4 Offenses

§ 46A-5 License

§ 46A-6 Revocation or suspension of license

§ 46A-7 Judicial Review

§ 46A-8 Public Nuisances

§ 46A-9 Injunctions

§ 46A-10 Exception to State Law

§ 46A-11 Severability Clause

Section 46A-1. *Definition of Terms:*

(a) "Film" means any motion picture film or series of films, whether full length or short subject, but does not include newsreels portraying actual current events or pictorial news of the day.

(b) "Exhibit" means to project a film at any motion picture theatre or other public place within the City of Dallas to which tickets are sold for admission.

(c) "Exhibitor" means any person, firm or corporation which exhibits a film.

(d) "Young person" means any person who has not attained his sixteenth birthday.

(e) "Board" means the Dallas Motion Picture Classification Board established by Section 46A-2 of this ordinance.

(f) "Not suitable for young persons" means:

(1) Describing or portraying brutality, criminal violence or depravity in such a manner as to be, in the judgment of

the Board, likely to incite or encourage crime or delinquency on the part of young persons; or

(2) Describing or portraying nudity beyond the customary limits of candor in the community, or sexual promiscuity or extra-marital or abnormal sexual relation in such a manner as to be, in the judgment of the Board, likely to incite or encourage delinquency or sexual promiscuity on the part of young persons or to appeal to their prurient interest.

A film shall be considered 'likely to incite or encourage' crime delinquency or sexual promiscuity on the part of young persons, if, in the judgment of the Board, there is a substantial probability that it will create the impression on young persons that such conduct is profitable, desirable, acceptable, respectable, praiseworthy or commonly accepted. A film shall be considered as appealing to 'prurient interest' of young persons, if in the judgment of the Board, its calculated or dominant effect on young persons is substantially to arouse sexual desire. In determining whether a film is 'not suitable for young persons', the Board shall consider the films as a whole, rather than isolated portions, and shall determine whether its harmful effects outweigh artistic or educational values such film may have for young persons.

(g) 'Classify' means to determine whether a film is:

(1) Suitable for young persons, or;

(2) Not suitable for young persons.

(h) 'Advertisement' means any commercial promotional material initiated by an exhibitor designed to bring a film

to public attention or to increase the sale of tickets to exhibitions of same, whether by newspaper, billboard, motion picture, television, radio, or other media within or originating within the City of Dallas.

(i) 'Initial exhibition' means the first exhibition of any film within the City of Dallas.

(j) 'Subsequent exhibition' means any exhibition subsequent to the initial exhibition, whether by the same or a different exhibitor.

(k) 'File' means to deliver to the City Secretary for safekeeping as a public record of the City of Dallas.

(l) 'Classification order' means any written determination by a majority of the Board classifying a film, or granting or refusing an application for change of classification.

(m) The term 'Board' as used and applied in subsection (a) of Section 46A-7 shall include the City of Dallas when attempting to enforce this ordinance and the City Attorney of the City of Dallas when representing the Board or the City of Dallas.

Section 46A-2. *Establishment of Board.*

There is hereby created a Board to be known as the Dallas Motion Picture Classification Board which shall be composed of a Chairman and Eight Members to be appointed by the Mayor and City Council of the City of Dallas, whose terms shall be the same as members of the City Council.

Such members shall serve without pay and shall adopt such rules and regulations as they deem best governing their action, proceeding and deliberations and time and place of meeting. These rules and regulations shall be subject to approval of the City Council. If a vacancy occurs upon the Board by death, resignation or otherwise, the governing body of the City of Dallas shall appoint a member to fill such vacancy for the unexpired term.

The Chairman and all Members of the Board shall be good, moral, law-abiding citizens of the City of Dallas, and shall be chosen so far as reasonably practicable in such a manner that will represent a cross section of the community. Insofar as practicable, the members appointed to the Board shall be persons educated and experienced in one or more of the following fields: art, drama, literature, philosophy, sociology, psychology, history, education, music, science or other related fields. The City Secretary shall act as Secretary of the Board.

Section 46A-3. *Classification Procedure:*

(a) Before any initial exhibition, the exhibitor shall file a proposed classification of the film to be exhibited, stating the title of the film and the name of the producer, and giving a summary of the plot and such other information as the Board may by rule require, together with the classification proposed by the exhibitor. The Board shall examine such proposed classification, and if it approves same, shall mark it 'approved' and file it as its own classification order.

If the Board fails to act, that is, either file a classification order or hold a hearing within five (5) days after such proposed classification is filed, the proposed classification shall be considered approved.

(b) If upon examination of the proposed classification a majority of the Board is not satisfied that it is proper, the Chairman shall direct the exhibitor to project the film before any five (5) or more members of the Board, at a suitably equipped place and at a specified time, which shall be the earliest time practicable with due regard to the availability of the film. The exhibitor, or his designated representative, may at such time make such statement to the Board in support of his proposed classification and present such testimony as he may desire. Within two (2) days, the Board shall make and file its classification of the film in question.

(c) Any initial or subsequent exhibitor may file an application for a change in the classification of any film previously classified. No exhibitor shall be allowed to file more than one (1) application for change of classification of the same film. Such application shall contain a sworn statement of the grounds upon which the application is based. Upon filing of such application, the City Secretary shall bring it immediately to the attention of the Chairman of the Board, who upon application by the exhibitor shall set a time and place for a hearing and shall notify the applicants and all interested parties, including all exhibitors who may be ex-

hibiting or preparing to exhibit the film. The Board shall view the film and at such hearing, hear the statements of all interested parties, and any proper testimony that may be offered, and shall within two (2) days thereafter make and file its order approving or changing such classification. If the classification of a film is changed as a result of such hearing to the classification 'not suitable for young persons', the exhibitors showing the film shall have seven (7) days in which to alter their advertising and audience policy to comply with such classification.

(d) Upon filing by the Board of any classification order, the City Secretary shall immediately issue and mail a notice of classification to the exhibitor involved and to any other exhibitor who shall request such notice.

(e) A classification shall be binding on any subsequent exhibitor unless and until he obtains a change of classification in the manner above provided.

Section 46A-4. *Offenses:*

(a) It shall be unlawful for any exhibitor or his employee:

(1) To exhibit any film which has not been classified as provided in this ordinance.

(2) To exhibit any film classified 'not suitable for young persons' if any current advertisement of such film by such exhibitor fails to state clearly the classification of such film.

(3) To exhibit any film classified 'not suitable for young persons' without keeping such classification

posted prominently in front of the theatre in which such film is being exhibited.

(4) Knowingly to sell or give to any young person a ticket to any film classified 'not suitable for young persons'.

(5) Knowingly to permit any young person to view the exhibition of any film classified 'not suitable for young persons'.

(6) To exhibit any film classified 'not suitable for young persons' or any scene or scenes from such a film, or from an unclassified film, whether moving or still, in the same theatre and on the same program with a film classified 'suitable for young persons'; provided that any advertising preview or trailer containing a scene or scenes from an unclassified film or a film classified 'not suitable for young persons' may be shown at any time if same has been separately classified as 'suitable for young persons' under the provisions of Section 46A-3 of this ordinance.

(7) To make any false or willfully misleading statement in any proposed classification, application for change of classification, or any other proceeding before the Board.

(8) To exhibit any film classified 'not suitable for young persons' without having in force the license hereinafter provided.

(b) It shall be unlawful for any young person:

(1) To give his age falsely as sixteen (16) years of age or over, for the purpose of gaining admittance to an exhibition of a film classified 'not suitable for young persons'.

(2) To enter or remain in the viewing room of any theatre where a film classified 'not suitable for young persons' is being exhibited.

(3) To state falsely that he or she is married for the purpose of gaining admittance to an exhibition of a film classified 'not suitable for young persons'.

(c) It shall be unlawful for any person:

(1) To sell or give any young person a ticket to an exhibition of a film classified 'not suitable for young persons'.

(2) To make any false or willfully misleading statement in an application for change of classification or in any proceeding before the Board.

(3) To make any false statements for the purpose of enabling any young person to gain admittance to the exhibition of a film classified as 'not suitable for young persons'.

(d) To the extent that any prosecution or other proceeding under this ordinance, involves the entering, purchasing of a ticket, or viewing by a young person of a film classified 'not suitable for young persons', it shall be a valid defense that such young person was accompanied by his legally appointed guardian, husband or wife, throughout the viewing of such film.

Section 46A-5. *License:*

Every exhibitor holding a motion picture theatre or motion picture show license issued pursuant to Chapter 46 of the 1960 Revised Code of Civil and Criminal Ordinances of the City of Dallas shall be entitled to issuance of a license by the City Secretary to exhibit films classified 'not suitable for young persons'.

Section 46A-6. *Revocation or suspension of license:*

Whenever the City Attorney or any person acting under his direction, or any ten (10) citizens of the City of Dallas, shall file a sworn complaint with the City Secretary stating that any exhibitor has repeatedly violated the provisions of this ordinance, or that any exhibitor has persistently failed to use reasonable diligence to determine whether those seeking admittance to the exhibition of a film classified 'not suitable for young persons' are below the age of sixteen (16), the City Secretary shall immediately bring such complaint to the attention of the City Council who shall set a time and place for hearing such complaint and cause notice of such hearing to be given to the complainants and to the exhibitor involved. The City Council shall have authority to issue subpoenas requiring witnesses to appear and testify at such hearing, and any party to such hearing shall be entitled to such process. If, after hearing the evidence, the City Council shall find the charges in such complaint to be true, it shall issue and file an order revoking or suspending the license above provided, insofar as it grants the privilege of showing such classified pictures, for a specific period not to exceed one (1) year, or may issue a reprimand if it is satisfied that such violation will not continue.

The City Council likewise, after notice and hearing, may revoke or suspend the license of any exhibitor who has refused or unreasonably failed to produce or delayed the submission of a film for review, when requested by the Board.

Section 46A-7. *Judicial Review:*

(a) Within two (2) days after the filing of any classification by the Board, other than an order approving the classification proposed by an exhibitor, any exhibitor may file a notice of non-acceptance of the Board's classification, stating his intention to exhibit the film in question under a different classification. Thereupon it shall be the duty of the Board to do the following:

(1) Within three (3) days thereafter to make application to a District Court of Dallas County, Texas, for a temporary and a permanent injunction to enjoin such defendant-exhibitor, being the exhibitor who contests the classification, from exhibiting the film in question contrary to the provisions of this ordinance.

(2) To have said application for temporary injunction set for hearing within five (5) days after the filing thereof. In the event the defendant-exhibitor appears at or before the time of the hearing of such temporary injunction, waives the notice otherwise provided by the Texas Rules of Civil Procedure, and requests that at the time set for such hearing the Court proceed to hear the case under the Texas Rules of Civil Procedure for permanent injunction on its merits, the Board shall be required to waive its application for temporary injunction and shall join in such request. In the event the defendant-exhibitor does not waive notice and/or does not request an early hearing on the Board's application for permanent injunction, it shall nevertheless be the duty of the board to obtain the earliest possible setting for such hearing under the provisions of State law and the Texas Rules of Civil Procedure.

(3) If the injunction is granted by the trial court and the defendant-exhibitor appeals to the Court of Civil

Appeals, the Board shall waive any and all statutory notices and times as provided for in the Texas State Statutes and the Texas Rules of Civil Procedure, and shall within five (5) days after receiving a copy of appealing exhibitor's brief, file its reply brief, if required, and be prepared to submit the case upon oral submission or take any other reasonable action requested by the appealing exhibitor to expedite the submission of the case to the Court of Civil Appeals, and shall upon request of the appealing exhibitor, jointly with such exhibitor, request the Court of Civil Appeals to advance the cause upon the docket and to give it a preferential setting the same as is afforded an appeal from a temporary injunction or other preferential matters.

(4) If the Court of Civil Appeals should by its judgment affirm the judgment of the trial court granting the injunction and the appealing exhibitor should file an application for writ of error to the Texas Supreme Court, the Board shall be required to waive any and all notices and times as provided for in the Texas State Statutes and the Texas Rules of Civil Procedure, and shall within five (5) days after receiving a copy of the application for writ of error, file its reply brief, if required, and be prepared to submit the case upon oral submission or take any other reasonable action requested by the appealing exhibitor to expedite the submission of the case to the Supreme Court and shall upon request of the appealing exhibitor, jointly with such exhibitor, request the Supreme Court to advance the cause upon the docket and to give it a preferential setting the same as is afforded an appeal from a temporary injunction or other preferential matters.

(5) If the District Court denies the Board's application for injunction, and the Board elects to appeal, the Board shall be required to waive all periods of time allowed it by the Texas Rules of Civil Procedure and if a motion for a new trial is required, shall file said mo-

tion within two (2) days after the signing of the judgment, (or on the following Monday if said period ends on a Saturday or Sunday, or on the day following if the period ends on a Legal Holiday), shall not amend said motion and shall obtain a hearing on such motion within five (5) days time. If no motion for new trial is required as a prerequisite to an appeal under the Texas Rules of Civil Procedure, the Board shall not file such a motion. Within ten (10) days after the judgment is signed by the District Court denying such injunction or within ten (10) days after the order overruling the Board's motion for new trial is signed, if such motion is required, the Board shall complete all steps necessary for the perfection of its appeal to the Court of Civil Appeals, including the filing of the Transcript, Statement of Facts and Appellant's brief. Failure to do so shall constitute an abandonment of the appeal. On filing the record with the Court of Civil Appeals, the Board shall file a motion to advance requesting the Court to give a preferential setting the same as is afforded an appeal from a temporary injunction or other preferential matters.

(6) If the Court of Civil Appeals reverses the trial court after the trial court has granted an injunction, or if the Court of Civil Appeals refuses to reverse the trial court after that court has failed to grant an injunction, then if the Board desires to appeal from the decision of the Court of Civil Appeals by writ of error to the Supreme Court of the State of Texas, it must file its motion for rehearing within two (2) days of rendition of the decision of the Court of Civil Appeals (or on the following Monday, if said period ends on a Saturday or Sunday, or on the day following if the period ends on a Legal Holiday), and shall file its application for writ of error within ten (10) days after the Court of Civil Appeals' order overruling such motion for rehearing, and failure to do so shall waive all rights to appeal from the decision of the Court of Civil Appeals. At the time of filing the application for writ

of error, the Board shall also request the Supreme Court to give the case a preferential setting and advance the same on the docket.

(b) The filing of such notice of non-acceptance shall not suspend or set aside the Board's order, but such order shall be suspended at the end of ten (10) days after the filing of such notice unless an injunction is issued within such period.

(c) Failure of any exhibitor to file the notice of non-acceptance within two (2) days as required in Subdivision (1) of this Section 46A-7, shall constitute acceptance of such classification order and such exhibitor shall be bound by such order in all subsequent proceedings except such proceedings as may be had in connection with any application for change of classification under Subdivision (c) of Section 46A-3 above.

Section 46A-8. *Public Nuisances:*

The following acts are declared to be public nuisances:

(a) Any violation of Subdivisions (1), (2), (3), or (6), of Subdivision (a) of Section 46A-4 of this ordinance.

(b) Any exhibition of a film classified as 'not suitable for young persons' at which more than three (3) young persons are admitted.

(c) Any exhibition of a film classified as 'not suitable for young persons' by an exhibitor who fails to use reasonable diligence to determine whether persons admitted to such exhibition are persons under the age of sixteen (16) years.

(d) Any exhibition of a film classified as 'not suitable for young persons' by an exhibitor who has been

convicted of as many as three (3) violations of Subdivisions (4) or (5) of Subdivision (a) of Section 46A-4 of this ordinance in connection with the exhibition of the same film.

Section 46A-9. *Injunctions:*

Whenever the Board has probable cause to believe that any exhibitor has committed any of the acts declared in Section 46A-8 above to be a public nuisance, the Board shall have the duty to make application to a court of competent jurisdiction for an injunction restraining the commission of such acts.

Section 46A-10. *Exemption to State Law:*

Nothing in this ordinance shall be construed to regulate public exhibitions pre-empted by Article 527 of the Penal Code of the State of Texas, as amended.

Section 46A-11. *Severability Clause:*

Should any section, subsection, sentence, provision, clause or phrase be held to be invalid for any reason, such holding shall not render invalid any other section, subsection, sentence, provision, clause or phrase of this ordinance, and the same are deemed severable for this purpose."

SECTION 2. That any person who shall violate any provisions of this ordinance shall be guilty of a misdemeanor and upon conviction thereof shall be subject to a fine not to exceed Two Hundred Dollars ($200.00) and each offense shall be deemed to be a separate violation and punishable

as a separate offense, and each day that a film is exhibited which has not been classified according to this ordinance shall be a separate offense.

SECTION 3. That Ordinance No. 10963 heretofore enacted by the City Council of the City of Dallas on April 5, 1965, be and the same is hereby in all things repealed and held for naught, and this ordinance is enacted in lieu thereof.

SECTION 4. The fact that Ordinance No. 10963 previously passed by the City Council of the City of Dallas has been declared to be unenforceable in the Courts by the Federal District Court, creates an urgency and an emergency in the preservation of the public peace, comfort and general welfare and requires that this ordinance shall take effect immediately from and after its passage, and it is accordingly so ordained.

## APPENDIX "B"

Section 46A-1. *Definition of Terms:*

(f) 'Not suitable for young persons' means:

(1) Describing or portraying brutality, criminal violence or depravity in such a manner as to be, in the judgment of the Board, likely to incite or encourage crime or delinquency on the part of young persons; or

(2) Describing or portraying nudity beyond the customary limits of candor in the community, or sexual promiscuity or extra-marital or abnormal sexual relations in such a manner as to be, in the judgment of the Board, likely to incite or encourage delinquency or sexual promiscuity on the part of young persons or to appeal to their prurient interest.

A film shall be considered 'likely to incite or encourage' crime delinquency or sexual promiscuity on the part of young persons, if, in the judgment of the Board, there is a substantial probability that it will create the impression on young persons that such conduct is profitable, desirable, acceptable, respectable, praiseworthy or commonly accepted. A film shall be considered as appealing to 'prurient interest' of young persons if in the judgment of the Board, its calculated or dominant effect on young persons is substantially to arouse sexual desire. In determining whether a film is 'not suitable for young persons', the Board shall consider the film as a whole, rather than isolated portions, and shall determine whether its harmful effects outweigh artistic or educational values such film may have for young persons.